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A DIGEST
OF THE
LAW OF AGENCY

BY
WILLIAM BOWSTEAD,
OF THE MIDDLE TEMPLE AND SOUTH-EASTERN CIRCUIT, BARRISTER-AT-LAW.

TENTH EDITION

BY
HIS HONOUR JUDGE
ARTHUR H. FORBES.

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PREFACE

IN this edition, I have included about sixty more reported cases, and have added a note on the criminal responsibility of corporations as principals.

The book remains, what it always was, a book for practitioners, who naturally find especial interest in those illustrations, appended to the exposition of principle, which most closely resemble the cases which they have in hand.

There is a vast amount of learning and criticism upon the subject of Agency to be found in extra-judicial writing, such as the American Restatement and articles in the Law Reviews of every country where English Common Law is applied. To collate this with Bowstead's work would enhance its value as a leading text-book; but it would necessitate rewriting the whole book,—a task impossible in this time of war, when bombed libraries and restricted travel hamper research.

ARTHUR H. FORBES.

CHARWELTON HALL,
July, 1944.

TABLE OF CONTENTS

	PAGE
PREFACE	iii
TABLE OF CASES	vii
<hr/>	
CHAP.	
I.—PRELIMINARY	1
II.—THE RELATION OF AGENCY	2
III.—IMPLIED AGENCY OF MARRIED WOMEN, &c.	20
IV.—APPOINTMENT OF AGENTS	30
V.—RATIFICATION OF UNAUTHORISED ACTS	33
VI.—AUTHORITY OF AGENTS	46
Implied Authority	51
Implied authority of particular classes of agents, as incidental to their employment	60
VII.—DELEGATION	69
VIII.—DUTIES OF AGENTS	74
Duties arising from the fiduciary character of the relationship	84
Duties of particular classes of agents	97
IX.—LIABILITIES OF AGENTS TO THEIR PRINCIPALS	102
X.—RIGHTS OF AGENTS AGAINST THEIR PRINCIPALS	118
Remuneration	118
Rights of reimbursement and indemnity	135
Lien	146
Other miscellaneous rights	164
XI.—RELATIONS BETWEEN THE PRINCIPAL AND THIRD PERSONS	167
What acts of agents bind their principals	167
Rights and Liabilities of Principal and contracts made by agent	185
Liability of principal for wrongs of agent	205
Admissions by and notice to agents	219
Rights of principal in respect of property intrusted to agent	227
Bribery of Agent	232
XII.—RELATIONS BETWEEN AGENTS AND THIRD PERSONS	234
Liabilities of agents in respect of contracts made by them	234
Liabilities of agents in respect of money received	255
Rights of agents against third persons	261
Liabilities of agents in respect of wrongs committed on principal's behalf	266
XIII.—DETERMINATION OF AGENCY	274
XIV.—CRIMINAL LIABILITY OF PRINCIPAL FOR ACTS OF AGENT	286
<hr/>	
INDEX	290

TABLE OF CASES

	PAGE
ABBOTT <i>Ex p.</i> (1883), 22 Ch. D. 593; 52 L. J. Ch. 434; 48 L. T. 259; 31 W. R. 425	221
—, <i>v. Harrison</i> (1899), 12 Mod. 346	284
Abel <i>v. Sutton</i> (1800), 3 Esp. 108; 6 R. R. 818	47, 174
Aberdeen Ry. <i>v. Blakie</i> (1854), 2 Eq. R. 1281; 1 Macq. 461; 149 R. R. 32	84
Abigail <i>v. Lapin</i> , [1934] A. C. 491; 103 L. J. P. C. 105; 151 L. T. 429	177
Abraham <i>v. Bullock</i> (1902), 86 L. T. 796; 50 W. R. 626	209
Abrahams <i>v. Buckley</i> , [1924] 1 K. B. 903; 93 L. J. K. B. 603; 131 L. T. 412	26
— <i>v. Deakin</i> , [1891] 1 Q. B. 516; 60 L. J. Q. B. 238; 63 L. T. 690; 39 W. R. 183; 55 J. P. 212; 7 T. L. R. 117	211
Acotos <i>v. Burns</i> (1878), 3 Ex. D. 282; 47 L. J. Ex. 566; 26 W. R. 624	67
Acey <i>v. Fernie</i> (1840), 10 L. J. Ex. 9; 7 M. & W. 151; 56 R. R. 671	54, 173
Adair, <i>Ex p.</i> (1871), 24 L. T. 198	273
— <i>v. Young</i> (1879), 12 Ch. D. 13; 40 L. T. 598	208
Adams, <i>Ex p.</i> (1884), 14 Q. B. D. 543; 54 L. J. Q. B. 76; 52 L. T. 240; 1 T. L. R. 114	153
— <i>v. Camfoni</i> , [1929] 1 K. B. 95; 98 L. J. K. B. 40; 139 L. T. 608; 44 T. L. R. 822	287
— <i>v. Grane</i> (1833), 2 L. J. Ex. 105; 1 C. & M. 380; 3 Tyr. 326; 38 R. R. 624	231
— <i>v. Hall</i> (1877), 37 L. T. 70	248
— <i>v. Morgan</i> , [1924] 1 K. B. 751; 93 L. J. K. B. 382; 130 L. T. 792; 40 T. L. R. 70	135
Adamson <i>v. Jarvis</i> (1827), 5 L. J. (o.s.) C. P. 68; 4 Bing. 66; 12 Moo. 241; 29 R. R. 503	142
Adansonie Fibre Co., <i>Re</i> (1874), L. R. 9 Ch. 635; 43 L. J. Ch. 732; 31 L. T. 9; 22 W. R. 889	190
Addison <i>v. Gandasequi</i> (1812), 4 Taunt. 574; 13 R. R. 689	195
Affréteurs Réunis S. A. <i>v. Walford</i> , [1919] A. C. 801; 88 L. J. K. B. 861; 121 L. T. 393; 35 T. L. R. 542	120
African Farms, <i>Re</i> , [1906] 1 Ch. 640; 75 L. J. Ch. 378; 95 L. T. 403; 54 W. R. 490	8
Agacio <i>v. Forbes</i> (1861), 14 Moo. P. C. 160; 4 L. T. 155; 9 W. R. 503; 134 R. R. 35	261
Agar <i>v. Athenæum Ass. Co.</i> (1858), 3 C. B. (n.s.) 725; 27 L. J. C. P. 95; 111 R. R. 817	170
Agge <i>v. Nicholson</i> (1856), 25 L. J. Ex. 345; 1 H. & N. 165; 28 L. T. 66; 108 R. R. 503	191, 243
Agnew <i>v. Manchester Corpn.</i> (1902), 67 J. P. 174; 1 L. G. R. 9	70
Agra Bank's Claim (1872), L. R. 8 Ch. 41; 27 L. T. 732; 21 W. R. 45	150
Agra Bank, <i>Ex p.</i> (1868), L. R. 3 Ch. 555; 37 L. J. Bk. 23; 18 L. T. 966	222
Aiken <i>v. Caledonian Ry.</i> , [1913] S. C. 66; 50 Sc. L. R. 45	217
Aitchison <i>v. Page Motors, Ltd.</i> (1935), 154 L. T. 128; 52 T. L. R. 137	209
Akrokerri Mines <i>v. Economic Bank</i> , [1904] 2 K. B. 465; 73 L. J. K. B. 742; 91 L. T. 175; 52 W. R. 670; 9 Com. Cas. 281; 20 T. L. R. 564	271
Albion, The (1872), 27 L. T. 723	162
Alder <i>v. Boyle</i> (1847), 4 C. B. 635; 16 L. J. C. P. 232	126
Alexander <i>v. Davis</i> (1885), 2 T. L. R. 142	283
— <i>v. Gibson</i> (1811), 2 Camp. 555; 11 R. R. 797	52
— <i>v. Mackenzie</i> (1848), 6 C. B. 766; 18 L. J. C. P. 94	183
— <i>v. Sizer</i> (1869), L. R. 4 Ex. 102; 38 L. J. Ex. 59; 20 L. T. 38	243
— <i>v. Southey</i> (1821), 5 B. & A. 247; 24 R. R. 348	272
— <i>v. Webber</i> , [1922] 1 K. B. 642; 91 L. J. K. B. 320; 126 L. T. 512; 38 T. L. R. 42	232

	PAGE
Alfred, The (1884), 5 Asp. M. C. 214; 50 L. T. 511.....	65
Alhambra, The (1881), 6 P. D. 68; 50 L. J. P. 36; 43 L. T. 636; 29 W. R. 655 ...	192
Allan v. Miller (1870), 22 L. T. 825	242
— v. Sundius (1862), 1 H. & C. 123; 31 L. J. Ex. 307; 6 L. T. 359; 130 R. R. 417	118
Allard v. Bourne (1863), 15 C. B. 468; 137 R. R. 608	42
Allaway v. Duncan (1867), 16 L. T. 264	244
Allchorn v. Hopkins (1905), 69 J. P. 355	286
Allen v. Bone (1841), 4 Beav. 493	31
— v. Clark (1863), 7 L. T. 781; 11 W. R. 304; 132 R. R. 815	109
— v. Denstone (1839), 8 C. & P. 760	219
— v. L. & S. W. Ry. (1870), L. R. 6 Q. B. 65; 40 L. J. Q. B. 55; 23 L. T. 612; 19 W. R. 127	56, 211
— v. Whitehead, [1930] 1 K. B. 211; 99 L. J. K. B. 146; 142 L. T. 141; 45 T. L. R. 655	286
— v. Whiteman (1920), 89 L. J. Ch. 534; 123 L. T. 773; 64 S. J. 727.....	57, 173
— v. Wingrove (1901), 17 T. L. R. 261	145
Alley v. Hotson (1815), 4 Camp. 325	275
Allkins v. Jupe (1877), 2 C. P. D. 375; 46 L. J. C. P. 824; 36 L. T. 851	131, 142
Alsager v. Currie (1844), 12 M. & W. 751; 13 L. J. Ex. 203; 67 R. R. 475	135
Alson v. Sylvester (1823), 1 C. & P. 107	102
Alsop v. Oxford (1833), 1 Myl. & K. 564; 2 L. J. Ch. 174; 36 R. R. 380	135
Alston, <i>Ex p.</i> (1868), L. R. 4 Ch. 168; 19 L. T. 542; 17 W. R. 266	231
Amber Size and Chemical Co. v. Menzel, [1913] 2 Ch. 239; 82 L. J. Ch. 573; 109 L. T. 250; 29 T. L. R. 590	90
Amos v. Temperley (1841), 11 L. J. Ex. 183; 8 M. & W. 798; 58 R. R. 876	237
Ancona v. Marks (1862), 7 H. & N. 686; 31 L. J. Ex. 163; 5 L. T. 753; 8 Jur. 516; 10 W. R. 251; 126 R. R. 646	34
Anderson v. Beard, [1900] 2 Q. B. 260; 69 L. J. Q. B. 610; 82 L. T. 714; 5 Com. Cas. 261; 16 T. L. R. 367	194
— v. Croall (1904), 8 F. 153	251
— v. Hillies (1852), 12 C. B. 499; 21 L. J. C. P. 150; 92 R. R. 775	205
— v. Sanderson (1817), 2 Stark. 204; Holt, 591; 19 R. R. 703	220
— v. Sutherland (1897), 13 T. L. R. 163	47
— v. Watson (1827), 3 C. & P. 214	269
Andrade v. Sotheby (1931), 47 T. L. R. 244	98, 106
Andrews v. Ramsay, [1903] 2 K. B. 635; 72 L. J. K. B. 865; 89 L. T. 450; 52 W. R. 126	133
Anglo-American Oil Co. v. Manning, [1908] 1 K. B. 536; 77 L. J. K. B. 205; 98 L. T. 570; 16 L. G. R. 399; 72 J. P. 35	287
Anglo-Maltese Dock Co., <i>Re</i> (1885), 54 L. J. Ch. 730; 52 L. T. 841; 33 W. R. 652; 1 T. L. R. 392	157
Anglo-Scottish Beet Sugar Corporation v. Spalding U. D. C., [1937] 2 K. B. 607; 106 L. J. K. B. 885; 157 L. T. 450; 81 S. J. 734; 53 T. L. R. 882; 3 All E. R. 335	212
Angus v. MacIachlan (1881), 23 Ch. D. 330; 52 L. J. Ch. 587; 48 L. T. 863; 31 W. R. 641	162
Annesley v. Muggridge (1816), 1 Madd. 596; 16 R. R. 273	187
Antisell v. Doyle, [1899] 3 Ir. R. 275	57
Antrobus v. Wickens (1865), 4 F. & F. 291; 142 R. R. 690	123
Apollo, The, [1891] A. C. 499; 61 L. J. P. 25; 65 L. T. 590; 7 T. L. R. 699	208
Applebee v. Percy (1874), L. R. 9 C. P. 647; 43 L. J. C. P. 365; 30 L. T. 785; 22 W. R. 704	223
Appleton v. Binks (1804), 5 East, 148; 1 Smith, 361; 7 R. R. 672	240
Apthorp v. Neville (1907), 23 T. L. R. 575	201
Archer v. Stone (1899), 79 L. T. 34	200
Archer's Case, [1892] 1 Ch. 322; 65 L. T. 800; 8 T. L. R. 90	96

	PAGE
<i>Armitage v. Nicholson</i> (1913), 108 L. T. 993; 77 J. P. 239; 29 T. L. R. 425; 23 Cox, C. C. 416	288, 289
<i>Armitstead, Ex p.</i> (1828), 2 G. & J. 371	229
<i>Armstrong v. Jackson</i> , [1917] 2 K. B. 822; 86 L. J. K. B. 1375; 117 L. T. 479; 33 T. L. R. 444	84
— <i>v. Stokes</i> (1872), L. R. 7 Q. B. 598; 41 L. J. Q. B. 253; 26 L. T. 872; 21 W. R. 52	188, 198
<i>Arnold v. Amari</i> , [1928] 1 K. B. 584; 97 L. J. K. B. 238; 138 L. T. 591; 44 T. L. R. 221	27
— <i>v. Cheque Bank</i> (1876), 1 C. P. D. 578; 45 L. J. C. P. 562; 34 L. T. 729; 24 W. R. 759	271
— <i>v. Poole (Corpn.)</i> (1842), 4 M. & G. 860; 12 L. J. C. P. 97; 5 Scott N. R. 741; 61 R. R. 664	32
<i>Arnot v. Biscoe</i> (1748), 1 Ves. 95	267
<i>Arthur, The</i> (1862), 6 L. T. 556	65
<i>Arthur v. Barton</i> (1840), 9 L. J. Ex. 187; 6 M. & W. 138; 55 R. R. 542	65, 66
<i>Arthur Average Assn., Re</i> (1876), 34 L. T. 942	185
<i>Arum, The</i> , [1921] P. 12; 90 L. J. P. 166; 37 T. L. R. 38	208
<i>Ashbury Carriage Co. v. Riche</i> (1875), L. R. 7 H. L. 653; 44 L. J. Ex. 185; 33 L. T. 450	4, 34, 46
<i>Ashton, Re</i> (1891), 64 L. T. 28; 39 W. R. 320; 7 T. L. R. 207	224
— <i>v. Spiers</i> (1893), 9 T. L. R. 606	55
<i>Asquith v. Asquith</i> , [1885] W. N. 31	117
<i>Assocd. Portland Cement Mfrs. v. Ashton</i> , [1915] 2 K. B. 1; 84 L. J. K. B. 519; 112 L. T. 486; 20 Com. Cas. 125	65
<i>Aste v. Montague</i> (1858), 1 F. & F. 264; 115 R. R. 903	284
<i>Astley v. Gurney</i> (1869), L. R. 4 C. P. 714; 38 L. J. C. P. 357; 18 W. R. 44	282
<i>Aston v. Kelsey</i> , [1913] 3 K. B. 314; 82 L. J. K. B. 817; 108 L. T. 750; 29 T. L. R. 530; 18 Com. Cas. 257	145
<i>Atkin, Ex p.</i> , [1904] 2 K. B. 753; 73 L. J. K. B. 854; 11 Manson, 256; 20 T. L. R. 727 ..	230
<i>Atkins v. Curwood</i> (1837), 7 C. & P. 756	21
<i>Atkinson v. Abbott</i> (1855), 3 Drew. 251; 106 R. R. 329	31, 64
— <i>v. Cotesworth</i> (1825), 3 B. & C. 647; 5 D. & R. 552; 1 C. & P. 339; 27 R. R. 450	264
<i>Atkyns v. Amber</i> (1796), 2 Esp. 493	265
— <i>v. Pearce</i> (1857), 2 C. B. 763; 26 L. J. C. P. 252; 109 R. R. 876	27
<i>Atlantic, The</i> (1863), 7 L. T. 647; 11 W. R. 188	133
<i>Atlantic Mutual Ins. Co. v. Huth</i> (1879), 16 Ch. D. 474; 44 L. T. 67; 29 W. R. 387 ..	67
<i>Attenborough v. London and St. Katharine's Docks</i> (1878), 3 C. P. D. 450; 47 L. J. C. P. 763; 33 L. T. 404; 26 W. R. 583	164
<i>Atterbury v. Wallis</i> (1856), 25 L. J. Ch. 792; 8 D. M. & G. 454; 2 Jur. 1177; 4 W. R. 734; 114 R. R. 194	225
<i>Att.-Gen. v. Chesterfield</i> (1854), 18 Beav. 596; 2 W. R. 499; 104 R. R. 542; 18 Jur. 686	72
— <i>v. Goddard</i> (1929), 98 L. J. K. B. 743; 73 S. J. 514; 45 T. L. R. 609	113, 114
— <i>v. Jackson</i> (1846), 5 Hare, 365	172
— <i>v. Leicester Corpn.</i> (1844), 7 Beav. 176; 64 R. R. 49	272
— <i>v. London Corpn.</i> (1849), 2 Mac. & G. 247; 2 H. & Tw. 1; 19 L. J. Ch. 314; 86 R. R. 92	82
— <i>v. Riddle</i> (1832), 1 L. J. Ex. 182; 2 C. & J. 493; 2 Tyr. 523	288
— <i>v. Siddon</i> (1830), 1 C. & J. 220; 1 Tyr. 41; 35 R. R. 701	288
— <i>v. Trueman</i> (1843), 11 M. & W. 694; 13 L. J. Ex. 70	156
— <i>v. Walmsley</i> (1843), 12 M. & W. 179; 13 L. J. Ex. 66	156
<i>Attwood v. Munnings</i> (1827), 6 L. J. (o.s.) K. B. 9; 7 B. & C. 278; 1 M. & R. 66; 31 R. R. 194	49, 172, 183
— <i>v. Small</i> (1838), 6 C. & F. 232; 49 R. R. 115, H. L.	222
<i>Audley's Case</i> (1597), Cro. Eliz. 561; 9 Rep. 106a	36
<i>August, The</i> (1891), P. 328; 69 L. J. P. 57; 66 L. T. 32	65

	PAGE
<i>Austin v. Chambers</i> (1837), 6 Cl. & F. 1; 49 R. R. 1	86
— <i>v. Guardians of Bethnal Green</i> (1874), L. R. 9 C. P. 91; 43 L. J. C. P. 100; 29 L. T. 807; 22 W. R. 406	32
<i>Australasian S. N. Co. v. Morse</i> (1872), L. R. 4 P. C. 222; 27 L. T. 357; 20 W. R. 728; 8 Moo. P. C. 482	67
<i>Australia, The</i> (1859), Swa. 480; 13 Moo. P. C. 132	34, 40, 67
<i>Australian Bank of Commerce v. Perel</i> , [1926] A. C. 737; 95 L. J. P. C. 185; 135 L. T. 586	16
<i>Auty v. Hutchinson</i> (1848), 6 C. B. 266; 17 L. J. C. P. 304; 77 R. R. 324; 12 Jur. 962	234
<i>Avery v. Charlesworth</i> (1914), 31 T. L. R. 52	244
<i>Ayrey v. British Legal, etc., Ass. Co.</i> , [1918] 1 K. B. 136; 87 L. J. K. B. 513; 118 L. T. 225; 34 T. L. R. 111	223
<i>BACMEISTER v. Fenton</i> (1883), 1 C. & E. 121	247
<i>Badman, Ex p.</i> (1890), 45 Ch. D. 16; 62 L. T. 179	39
<i>Bagnall v. Carlton</i> (1877), 6 Ch. D. 371; 47 L. J. Ch. 30; 37 L. T. 481; 26 W. R. 243 ..	95
<i>Baile v. Baile</i> (1871), L. R. 13 Eq. 497; 41 L. J. Ch. 300; 26 L. T. 283	162
<i>Bailey v. Macauley</i> (1849), 13 Q. B. 815; 19 L. J. Q. B. 73; 78 R. R. 524	16, 249
<i>Baillie's Case</i> , [1898] 1 Ch. 110; 67 L. J. Ch. 81; 77 L. T. 523; 46 W. R. 187; 4 Manson, 393	199
<i>Bain v. Central Vermont Ry. Co.</i> , [1921] 2 A. C. 412; 90 L. J. P. C. 221	213
<i>Bainbridge v. Postmaster-General</i> , [1906] 1 K. B. 178; 75 L. J. K. B. 366; 94 L. T. 120; 54 W. R. 221; 22 T. L. R. 70	267
<i>Baines v. Ewing</i> (1866), L. R. 1 Ex. 320; 35 L. J. Ex. 194; 14 L. T. 733; 14 W. R. 782; 4 H. & C. 511; 143 R. R. 754	174
<i>Bake v. French</i> , [1907] 1 Ch. 428; 76 L. J. Ch. 299; 96 L. T. 496	164
<i>Baker v. Buckle</i> (1822), 7 Moo. 349; 24 R. R. 685	65
— <i>v. Keen</i> (1819), 2 Stark. 501	29
— <i>v. Langhorn</i> (1816), 6 Taunt. 519; 4 Camp. 396; 2 Marsh. 215; 16 R. R. 662	102, 138
— <i>v. Nottingham Bank</i> (1891), 60 L. J. Q. B. 542	159
— <i>v. Sampson</i> (1863), 14 C. B. 383; 135 R. R. 743	26, 27
— <i>v. Snell</i> , [1908] 2 K. B. 825; 77 L. J. K. B. 1090; 99 L. T. 753; 24 T. L. R. 811	210
<i>Balch v. Symes</i> (1823), 1 T. & R. 87; 23 R. R. 195	151
<i>Baldry v. Bates</i> (1885), 52 L. T. 620; 1 T. L. R. 558	52
<i>Baldwin v. Casella</i> (1872), L. R. 7 Ex. 325; 41 L. J. Ex. 167; 26 L. T. 707; 21 W. R. 16	223
<i>Balf v. West</i> , (1853), 13 C. B. 466; 22 L. J. C. P. 175; 93 R. R. 620	74
<i>Balfour v. Ernest</i> (1859), 5 C. B. (N.S.) 601; 28 L. J. C. P. 170; 7 W. R. 207; 116 R. R. 788	185
<i>Balkis Consolidated Co. v. Tomkinson</i> , [1893] A. C. 396; 63 L. J. Q. B. 134; 69 L. T. 598; 32 W. R. 204	173
<i>Ball v. Dunsterville</i> (1791), 4 T. R. 313; 2 R. R. 394	31
<i>Bamford v. Shuttleworth</i> (1840), 11 A. & E. 926; 52 R. R. 542	267
<i>Banbury v. Bank of Montreal</i> , [1918] A. C. 626; 87 L. J. K. B. 1158; 119 L. J. 446; 34 T. L. R. 578	174
<i>Bangor Castle, The</i> (1896), 74 L. T. 768	156
<i>Bank of Australasia v. Breillat</i> (1847), 6 Moo. P. C. 152, 194; 12 Jur. 189; 79 R. R. 24 ..	11
<i>Bank of Bengal v. Fagan</i> (1849), 7 Moo. P. C. 61; 5 Moo. Ind. App. 27; 83 R. R. 15; 13 Jur. 945	50
— <i>v. McLeod</i> (1849), 7 Moo. P. C. 35; 5 Moo. Ind. App. 1; 83 R. R. 1; 13 Jur. 945	50
<i>Bank of England v. Cutler</i> , [1908] 2 K. B. 208; 77 L. J. K. B. 889; 98 L. T. 336	251
<i>Bank of Ireland v. Evans' Trustees</i> (1855), 5 H. L. C. 389; 101 R. R. 218	177

<i>Bank of New South Wales v. Goulburn Valley Butter Factory</i> , [1902] A. C. 543; 71 L. J. P. C. 112; 87 L. T. 88; 51 W. R. 367	159, 178, 227, 273
— <i>v. Owston</i> (1879), 4 App. Cas. 270; 48 L. J. P. C. 25; 40 L. T. 500	55, 211
<i>Bank of Scotland v. Dominion Bank</i> , [1891] A. C. 592, H. L. Sc.	52, 105
— <i>v. Watson</i> (1813), 1 Dow, 40; 14 R. R. 11	52, 172
<i>Bannatyne v. MacIver</i> , [1908] 1 K. B. 103; 75 L. J. K. B. 120; 94 L. T. 150; 54 W. R. 293	214
<i>Banner, Ex p.</i> (1876), 2 Ch. D. 278; 45 L. J. Bk. 73; 34 L. T. 199; 24 W. R. 476... ..	164
<i>Banque Jacques Cartier v. Banque d'Epargne</i> (1887), 13 App. Cas. 111; 57 L. J. P. C. 42	33, 39
<i>Barber, Ex p.</i> (1843), 3 M. D. & De G. 174	148
— <i>v. Rigley</i> (1922), 38 T. L. R. 650	228
— <i>v. Stone</i> (1881), 50 L. J. Q. B. 297	106
— <i>v. Taylor</i> (1839), 5-M. & W. 527; 9 L. J. Ex. 21; 52 R. R. 814	75
<i>Barclay v. Harris</i> (1915), 85 L. J. K. B. 115; 112 L. T. 1134; 31 T. L. R. 213.....	115
<i>Barfield, Re</i> (1871), 24 L. T. 248; 19 W. R. 466	116
<i>Bargate v. Shortridge</i> (1855), 5 H. L. C. 297; 24 L. J. Ch. 457; 101 R. R. 163.....	171
<i>Baring v. Corrie</i> (1818), 2 B. & A. 137; 20 R. R. 383	2, 60, 61, 97, 147, 202, 203
— <i>v. Stanton</i> (1876), 3 Ch. D. 502; 35 L. T. 652; 25 W. R. 237.....	95, 118
<i>Barker v. Fleetwood</i> (1890), 6 T. L. R. 430	108
— <i>v. Furlong</i> , [1891] 2 Ch. 172; 60 L. J. Ch. 368; 64 L. T. 411; 39 W. R. 621... ..	270, 271
— <i>v. Greenwood</i> (1836), 2 Y. & C. 414; 6 L. J. Ex. Eq. 54; 47 R. R. 431; 1 Jur. 541	47, 205
— <i>v. Harrison</i> (1846), 2 Coll. 546	93
— <i>v. Hingley</i> (1863), 15 C. B. 27; 32 L. J. C. P. 270; 9 L. T. 228; 11 W. R. 968; 137 R. R. 365	53
— <i>v. Stead</i> (1847), 3 C. B. 946; 16 L. J. C. P. 160	16
<i>Barkworth, Ex p.</i> (1858), 2 De G. & J. 194; 27 L. J. Bk. 5; 119 R. R. 84.....	229
<i>Barlow v. Browne</i> (1846), 16 M. & W. 126; 16 L. J. Ex. 62	260
<i>Barnes v. Addy</i> (1873), L. R. 9 Ch. 244; 43 L. J. Ch. 513; 30 L. T. 4; 22 W. R. 505... ..	273
— <i>v. Akroyd</i> (1872), L. R. 7 Q. B. 474; 41 L. J. M. C. 110; 26 L. T. 692; 20 W. R. 671	268
<i>Barnett v. Brown</i> (1890), 6 T. L. R. 463	122
— <i>v. Crystal Palace Co.</i> (1861), 4 L. T. 403	215
— <i>v. Isaacson</i> (1888), 4 T. L. R. 645	122
— <i>v. Sanker</i> (1925), 41 T. L. R. 660; 69 S. J. 824	143
— <i>v. S. London Tram.</i> (1887), 18 Q. B. D. 815; 56 L. J. Q. B. 452; 57 L. T. 436; 35 W. R. 640; 3 T. L. R. 611	175, 221
<i>Baron v. Husband</i> (1833), 4 B. & Ad. 611; 1 N. & M. 728	260
<i>Barrett v. Deere</i> (1828), Moo. & M. 200; 31 R. R. 730	18
— <i>v. Gilmour</i> (1901), 6 Com. Cas. 72	121, 283
— <i>v. Irvine</i> , [1907] 2 Ir. R. 462	2, 17, 42, 170
<i>Barron v. Fitzgerald</i> (1840), 6 Bing. N. C. 201	144
<i>Barrow v. Dyster</i> (1864), 13 Q. B. D. 635; 51 L. T. 573; 33 W. R. 199	247
<i>Barry, Ex p.</i> (1870), L. R. 5 Ch. 457; 39 L. J. Ch. 780; 22 L. T. 461; 18 W. R. 657... ..	64
— <i>v. Butlin</i> (1838), 2 Moo. P. C. 480; 46 R. R. 123	90
— <i>v. Longmore</i> (1840), 12 A. & E. 639; 4 P. & D. 344; 54 R. R. 654	158
— <i>v. Stevens</i> (1862), 31 Beav. 258; 31 L. J. Ch. 785; 10 W. R. 822; 6 L. T. 568... ..	91
<i>Bartlett v. Pentland</i> (1830), 10 B. & C. 760; L. & W. 235; 34 R. R. 560	48
— <i>v. Pickersgill</i> (1785), 1 Cox, 15; 4 East, 577, n.; 1 R. R. 1.....	86
— <i>v. Purnell</i> (1836), 4 A. & E. 792; 6 N. & M. 299; 2 H. & W. 19; 5 L. J. K. B. 169; 43 R. R. 484.....	13, 200
<i>Bartram v. Lloyd</i> (1904), 90 L. T. 357; 20 T. L. R. 281	232
<i>Barwell v. Parker</i> (1751), 2 Ves. 364	115
<i>Barwick v. English Joint Stock Bank</i> (1867), L. R. 2 Ex. 259; 36 L. J. Ex. 147; 16 L. T. 461; 15 W. R. 877.....	211, 212, 215

	PAGE
<i>Baschet v. London Illustrated Standard Co.</i> , [1901] 1 Ch. 73; 69 L. J. Ch. 35; 81 L. T. 509; 48 W. R. 56	268
<i>Baseley v. Forder</i> (1868), L. R. 3 Q. B. 559; 37 L. J. Q. B. 237; 18 L. T. 756; 9 B. & S. 599	25
<i>Bateman v. Mid-Wales Ry.</i> (1866), L. R. 1 C. P. 499; 35 L. J. C. P. 205; 1 H. & R. 508; 14 W. R. 672	4
— <i>v. Phillips</i> (1812), 15 East, 272; 4 Taunt. 157; 38 R. R. 554	187
<i>Bates v. Pilling</i> (1826), 5 L. J. (o.s.) K. B. 40; 6 B. & C. 38; 9 D. & R. 44	208
<i>Bath v. Standard Land Co.</i> , [1911] 1 Ch. 618; 80 L. J. Ch. 426; 104 L. T. 867; 27 T. L. R. 393	6
<i>Batson v. Newman</i> (1876), 1 C. P. D. 573	284
<i>Battams v. Tompkins</i> (1892), 8 T. L. R. 707	118
<i>Batten v. Wedgwood Coal Co.</i> (1886), 2 T. L. R. 236	109
<i>Battersby v. Smyth</i> (1818), 3 Madd. 110	91
<i>Bauerman v. Radenius</i> (1798), 7 T. R. 663; 2 Esp. 653	266
<i>Baumwoll Manufacture v. Furness</i> , [1893] A. C. 8; 62 L. J. Q. B. 201; 68 L. T. 1; 9 T. L. R. 71	17, 65
<i>Bawden v. London Ass. Co.</i> , [1892] 2 Q. B. 534; 8 T. L. R. 566	223
<i>Baxendale v. Bennett</i> (1878), 3 Q. B. D. 525; 47 L. J. Q. B. 624; 26 W. R. 899	168
<i>Baxter v. F. W. Gapp & Co., Ltd.</i> , [1939] 2 K. B. 271; 108 L. J. K. B. 522; 160 L. T. 533; 55 T. L. R. 739; [1939] 2 All E. R. 752	79
<i>Bayley v. Chadwick</i> (1878), 39 L. T. 429	120, 122
— <i>v. M. S. & L. Ry.</i> (1873), L. R. 8 C. P. 148; 42 L. J. C. P. 78; 28 L. T. 366	216
— <i>v. Wilkins</i> (1849), 7 C. B. 886; 18 L. J. C. P. 273; 78 R. R. 849; 13 Jur. 883	52, 139
<i>Bayliffe v. Butterworth</i> (1847), 17 L. J. Ex. 78; 1 Ex. 425; 5 Rail. Cas. 283; 11 Jur. 1019; 74 R. R. 702	139
<i>Baylis v. Watkins</i> (1864), 33 L. J. Ch. 300; 9 L. T. 741; 12 W. R. 324; 2 D. J. & S. 91; 10 Jur. 114; 139 R. R. 42	26, 99
<i>Bayntun v. Cattle</i> (1833), 1 M. & Rob. 265	80
<i>Bazeley v. Forder</i> (1868), L. R. 3 Q. B. 559; 37 L. J. Q. B. 237; 18 L. T. 756; 9 B. & S. 599	25
<i>Beable v. Dickerson</i> (1885), 1 T. L. R. 654	120
<i>Beal v. S. Devon Ry.</i> (1864), 3 H. & C. 337; 11 L. T. 184; 12 W. R. 1115	77, 78
<i>Beale, Re</i> (1888), 5 M. B. R. 37	122
— <i>v. Arabin</i> (1877), 36 L. T. 249	23
— <i>v. Bond</i> (1901), 84 L. T. 313; 17 T. L. R. 280	126
<i>Beall, Ex p.</i> (1883), 24 Ch. D. 408; 53 L. J. Ch. 71; 49 L. T. 697; 32 W. R. 260	157, 163
<i>Bean v. Wade</i> (1885), 2 T. L. R. 157	103, 109
<i>Bear v. Stevenson</i> (1874), 30 L. T. 177	273
<i>Beard v. L. G. O. Co.</i> , [1900] 2 Q. B. 530; 69 L. J. Q. B. 895; 83 L. T. 362; 48 W. R. 658	210
<i>Bearn, The</i> , [1916] P. 48; 75 L. J. P. 9; 94 L. T. 265; 22 T. L. R. 165	6
<i>Beattie v. Ebury</i> (1874), 41 L. J. Ch. 804; L. R. 7 Ch. 777; affirmed, L. R. 7 H. L. 102; 44 L. J. Ch. 20; 30 L. T. 581; 22 W. R. 897	250
<i>Beauchamp v. Powley</i> (1831), 1 M. & Rob. 38	107
<i>Beaufort v. Neeld</i> (1845), 12 C. & F. 248; 9 Jur. 813	51, 168
<i>Beaumont v. Boulton</i> (1802—1805), 5 Ves. 485; 7 Ves. 599; 11 Ves. 358; 4 R. R. 244	91, 132
<i>Bechuanaland Exploration Co. v. London Trading Bank</i> , [1898] 2 Q. B. 658; 67 L. J. Q. B. B. 986; 79 L. T. 270	178
<i>Becker v. Medd</i> (1897), 13 T. L. R. 313	109
— <i>v. Riebold</i> (1913), 30 T. L. R. 142	40
<i>Beckett, Re</i> , [1918] 2 Ch. 72; 87 L. J. Ch. 457; 119 L. T. 108; 34 T. L. R. 389	71
<i>Beckhuson v. Hamblett</i> , [1901] 2 K. B. 73; 70 L. J. K. B. 600; 84 L. T. 617; 49 W. R. 481; 6 Com. Cas. 141	59, 194
<i>Beckwith v. Bullen</i> (1858), 8 E. & B. 683; 27 L. J. Q. B. 162; 112 R. R. 728	138
<i>Beer v. Beer</i> (1906), 22 T. L. R. 367	26, 99
<i>Beigtheil v. Stewart</i> (1900), 16 T. L. R. 177	243

	PAGE
<i>Beldon v. Campbell</i> (1851), 20 L. J. Ex. 342; 6 Ex. 886; 86 R. R. 534	65, 66
<i>Bell v. Auldjo</i> (1784), 4 Doug. 48	61
— <i>v. Balls</i> , [1897] 1 Ch. 663; 66 L. J. Ch. 397; 76 L. T. 254; 45 W. R. 378; 13 T. L. R. 274	13
— <i>v. Kymer</i> (1814), 5 Taunt. 477; 1 Marsh. 146; 3 Camp. 545	237
— <i>v. Lever Brothers, Ltd.</i> , [1932] A. C. 161; 101 L. J. K. B. 129; 146 L. T. 258; 37 Com. Cas. 98; 48 T. L. R. 133	84
— <i>v. Nixon</i> (1832), 9 Bing. 393; 2 M. & Scott, 534	9
— <i>v. N. W. Ry.</i> (1852), 15 Beav. 548; 19 L. T. 202; 92 R. R. 538	260
— <i>v. Plumbly</i> (1900), 16 T. L. R. 393	185
<i>Belshaw v. Bush</i> (1852), 11 C. B. 191; 22 L. J. C. P. 24; 87 R. R. 639; 17 Jur. 67... ..	42
<i>Benham v. Batty</i> (1865), 12 L. T. 266; 13 W. R. 636; 6 N. R. 42; 145 R. R. 786... ..	40
<i>Beningfield v. Kynaston</i> (1887), 3 T. L. R. 279	126
<i>Benjamin v. Barnett</i> (1903), 8 Com. Cas. 244; 19 T. L. R. 564	59, 140, 144
<i>Bennett, Re</i> (1892), 8 T. L. R. 194	105
— <i>v. Bacon</i> (1897), 13 T. L. R. 204	68
— <i>v. Bayes</i> (1860), 5 H. & N. 391; 29 L. J. Ex. 224; 8 W. R. 320; 120 R. R. 654... ..	267
<i>Bennetts v. McIlwraith</i> , [1896] 2 Q. B. 464; 65 L. J. Q. B. 632; 75 L. T. 145; 45 W. R. 17; 12 T. L. R. 616	250
<i>Benson, Ex p.</i> (1832), 1 Dea. & Ch. 435	229
— <i>v. Duncan</i> (1849), 3 Ex. 644; 18 L. J. Ex. 169; 77 R. R. 776; 14 Jur. 218.....	67
— <i>v. Heathorn</i> (1842), 1 Y. & Col. C. C. 326; 57 R. R. 351	86, 95, 116
<i>Bentall v. Vicary</i> , [1931] 1 K. B. 253; 100 L. J. K. B. 201; 144 L. T. 364; 47 T. L. R. 99	130
<i>Bentinck v. Fenn</i> (1887), 12 A. C. 652	86, 97
— <i>v. London Joint Stock Bank</i> , [1893] 2 Ch. 120; 62 L. J. Ch. 358; 68 L. T. 315; 42 W. R. 140	176, 178
<i>Bentley, Re</i> (1893), 69 L. T. 204	18
— <i>v. Craven</i> (1853), 18 Beav. 75; 104 R. R. 373	84, 85
— <i>v. Griffin</i> (1814), 5 Taunt. 356	28, 186
<i>Benton v. Campbell</i> , [1925] 2 K. B. 410; 94 L. J. K. B. 881; 134 L. T. 60; 41 T. L. R. 662	238
<i>Beresford v. Driver</i> (1851), 14 Beav. 387; 20 L. J. Ch. 476	77
<i>Berkeley v. Hardy</i> (1826), 8 D. & R. 102; 5 B. & C. 355; 29 R. R. 261; 4 L. J. (o.s.) K. B. 184	31, 76, 189
<i>Berrie v. Howitt</i> (1869), L. R. 9 Eq. 1	153
<i>Bertram v. Godfray</i> (1830), 1 Knapp, 381	48, 74
<i>Best v. Hayes</i> (1862), 3 F. & F. 113; 1 H. & C. 718; 32 L. J. Ex. 129; 1 H. & C. 718; 130 R. R. 749	165
<i>Betham v. Benson</i> (1818), Gow, 45.....	219
<i>Betteley v. Reed</i> (1843), 3 G. & D. 561; 4 Q. B. 511; 12 L. J. Q. B. 172; 62 R. R. 417	83
<i>Betts v. De Vitre</i> (1868), L. R. 3 Ch. 429; 37 L. J. Ch. 325; 18 L. T. 165; 16 W. R. 529	207
— <i>v. Gibbins</i> (1834), 2 A. & E. 57; 4 N. & M. 64; 4 L. J. K. B. 1; 41 R. R. 381... ..	142
<i>Bevan, Re</i> (1855), 20 Beav. 146; 109 R. R. 378	64
— <i>v. National Bank</i> ; Same <i>v. C. & C. Bank</i> (1906), 23 T. L. R. 65.....	272
— <i>v. Webb</i> , [1901] 2 Ch. 59; 70 L. J. Ch. 536; 84 L. T. 609; 49 W. R. 548.....	7
<i>Bevan and Whiting, Re</i> (1864), 33 Beav. 439; 140 R. R. 208	151
<i>Bexwell v. Christie</i> (1776), Cowp. 395	75, 99
<i>Beyer v. Adams</i> (1857), 26 L. J. Ch. 841	81
<i>Beyts, Re</i> (1894), 70 L. T. 561; 42 W. R. 432	281
<i>Bickerton v. Burrell</i> (1816), 5 M. & S. 383	261
<i>Bickley v. Browning</i> (1913), 30 T. L. R. 134.....	121
<i>Biddle v. Bond</i> (1865), 6 B. & S. 225; 34 L. J. Q. B. 137; 12 L. T. 178; 13 W. R. 561; 11 Jur. 425; 141 R. R. 387	83

	PAGE
Biederman v. Stone (1867), L. R. 2 C. P. 504; 36 L. J. C. P. 198; 16 L. T. 415; 15 W. R. 811	139
Bien, The (1910), 27 T. L. R. 9	208
Biffin v. Bignell (1862), 7 H. & N. 877; 31 L. J. Ex. 189; 6 L. T. 248; 10 W. R. 322; 8 Jur. 647; 126 R. R. 739	24
Bigg v. Strong (1858), 3 Sm. & G. 592; 4 Jur. 983; 6 W. R. 536; 107 R. R. 167.....	40
Biggar v. Rock Life Ass. Co., [1902] 1 K. B. 516; 71 L. J. K. B. 79; 85 L. T. 636...	174
Biggerstaff v. Rowatt's Wharf, [1896] 2 Ch. 93; 65 L. J. Ch. 536; 74 L. T. 473; 44 W. R. 536	171
Biggs v. Bree (1882), 51 L. J. Ch. 64, 263; 45 L. T. 648; 46 L. T. 8; 30 W. R. 132, 278..	99
— v. Evans, [1894] 1 Q. B. 88; 69 L. T. 723; 10 T. L. R. 59	183
— v. Gordon (1860), 8 C. B. 638; 125 R. R. 824.....	118
— v. Head (1837), Sau. & Sc. 335	100
— v. Lawrence (1789), 3 T. R. 454; 1 R. R. 740	200, 220
Bilbee v. Hasse (1889), 5 T. L. R. 677	124
Bingham v. Allport (1833), 1 N. & M. 398; 2 L. J. K. B. 86; 38 R. R. 385	169
Binstead v. Buck (1776), 2 Wm. Bl. 1117	15
Bird, <i>Ex p.</i> (1864), 4 D. J. & S. 200; 33 L. J. Bk. 49; 12 W. R. 321; 9 L. T. 669; 10 Jur. 138; 146 R. R. 277	237
—, <i>Re Bourne</i> (1851), 20 L. J. Bk. 16; 4 De G. & S. 273	266
— v. Boulter (1833), 1 N. & M. 313; 4 B. & Ad. 443; 38 R. R. 285	5, 13
— v. Brown (1850), 4 Ex. 786; 19 L. J. Ex. 154; 80 R. R. 775; 14 Jur. 132; 14 L. T. 399	31, 37, 38, 43
— v. Jones (1828), 3 M. & R. 121	23
— v. M'Gahey (1849), 2 C. & K. 707	119
Birmingham Banking Co., <i>Ex p.</i> (1868), L. R. 3 Ch. 651	70, 71
Birmam Wood, The, [1907] P. 1; 76 L. J. P. 1; 96 L. T. 140; 10 Asp. M. C. 325; 23 T. L. R. 58	152, 153
Birt, <i>Re</i> ; Birt v. Burt (1883), 22 Ch. D. 604; 52 L. J. Ch. 397	84
Bishop, <i>Ex p.</i> (1880), 15 Ch. D. 400; 50 L. J. Ch. 18; 43 L. T. 165; 29 W. R. 144....	137
— v. Jersey (1854), 2 Drew. 143; 23 L. J. Ch. 483; 100 R. R. 51	213
Bissell v. Bradford Tram Co. (1893), 9 T. L. R. 337	163
— v. Fox (1885), 53 L. T. 193	272
Bize v. Dickason (1786), 1 T. R. 285	138
Black v. Christchurch Co., [1894] A. C. 48; 63 L. J. P. C. 32; 70 L. T. 77; 58 J. P. 332 ..	2
— v. Creighton (1828), 2 Moll. 552	135
Blackburn v. Haslam (1888), 21 Q. B. D. 144; 57 L. J. Q. B. 479; 59 L. T. 407; 36 W. R. 855; 4 T. L. R. 577	200
— v. Kymer (1814), 5 Taunt. 584	169
— v. Mason (1893), 9 T. L. R. 286; 68 L. T. 510.....	47, 72, 138
— v. Scholes (1810), 2 Camp. 343; 11 R. R. 723	201, 274
— v. Vigers (1887), 12 App. Cass. 531; 57 L. J. Q. B. 114; 57 L. T. 730; 36 W. R. 449; 3 T. L. R. 837	223
Blackstone v. Wilson (1857), 26 L. J. Ex. 229; 112 R. R. 922	221
Blades v. Free (1829), 9 B. & C. 167; 4 M. & R. 282; 32 R. R. 620; 7 L. J. (o.s.) K. B. 211	29, 279, 285
Blain, <i>Ex p.</i> (1879), 12 Ch. D. 522; 41 L. T. 46; 28 W. R. 334	175
Blaine v. Holland (1889), 60 L. T. 285	194
Blake v. Albion Life Ass. Co. (1878), 4 C. P. D. 94; 48 L. J. C. P. 169; 40 L. T. 211; 27 W. R. 321	211
Blaker v. Hawes (1913), 109 L. T. 320; 29 T. L. R. 609	145
Blakey v. Latham (1889), 41 Ch. D. 518; 60 L. T. 624; 37 W. R. 569	154
Blane, <i>Ex p.</i> See <i>Re Hallett</i> .	
Blaustein v. Maltz, [1937] 2 K. B. 142; 106 L. J. K. B. 471; 156 L. T. 316; 81 S. J. 177; 53 T. L. R. 397; [1937] 1 All E. R. 497	80, 83
Bligh v. Davies (1860), 28 Beav. 211; 126 R. R. 95	162
Blore v. Sutton (1816), 3 Meriv. 237; 17 R. R. 74	70, 71

	PAGE
<i>Bloye's Trust, Re</i> (1849), 1 Mac. & G. 488; 2 H. & Tw. 140; 19 L. J. Ch. 89; 84 R. R. 134	85
<i>Blucher (Prince), Re</i> , [1931] 2 Ch. 70; 100 L. J. Ch. 292; 144 L. T. 152; 47 T. L. R. 19	8
<i>Blumberg v. Life Interests, etc., Corpn.</i> , [1897] 1 Ch. 171; 66 L. J. Ch. 127; 75 L. T. 627; 45 W. R. 246, affirmed, [1898] 1 Ch. 27; 67 L. J. Ch. 118; 77 L. T. 506 ...	47, 64
<i>Blyth v. Fladgate</i> , [1891] 1 Ch. 337; 60 L. J. Ch. 66; 63 L. T. 546; 39 W. R. 422 ...	109
— <i>v. Whiffin</i> (1872), 27 L. T. 330	91, 164, 165
<i>Boardman v. Sill</i> (1808), 1 Camp. 410 n.	163
<i>Bock v. Gorriassen</i> (1861), 30 L. J. Ch. 39; 3 L. T. 424; 9 W. R. 209; 2 D. F. & J. 434; 7 Jur. 81; 3 L. T. 424; 129 R. R. 136	146, 147
<i>Boden, Ex p.</i> (1873), 28 L. T. 174	229
— <i>v. French</i> (1851), 20 L. J. O. P. 143; 10 C. B. 886; 84 R. R. 836	48
<i>Bodenham v. Hoskyns</i> (1852), 2 D. M. & G. 903; 21 L. J. Ch. 864; 95 R. R. 363; 16 Jur. 721	227, 273
<i>Boehm v. Goodall</i> (1910), 27 T. L. R. 106	12
<i>Bogle v. Atty</i> (1818), Gow, 50	66
<i>Bold Buccleugh, The</i> (1850), 7 Moo. P. C. 267; 83 R. R. 43	155
<i>Bolinbroke v. Swindon</i> (1874), L. R. 9 C. P. 575; 43 L. J. C. P. 287; 30 L. T. 723; 23 W. R. 47	207
<i>Bolton Partners v. Lambert</i> (1888), 41 Ch. D. 295; 58 L. J. Ch. 425; 60 L. T. 687; 5 T. L. R. 357	39
<i>Bond, Ex p.</i> (1840), 1 M. D. & De G. 10	229
— <i>v. Evans</i> (1888), 21 Q. B. D. 249; 57 L. J. M. C. 105; 59 L. T. 411; 36 W. R. 767	286
<i>Bone v. Elkless</i> (1860), 5 H. & N. 925; 29 L. J. Ex. 438; 120 R. R. 896	80
<i>Bonfield v. Smith</i> (1844), 12 M. & W. 405	237
<i>Bonita, The</i> (1861), Lush. 252; 30 L. J. Ad. 145; 5 L. T. 141	39, 41, 67
<i>Bontex Knitting Works, Ltd. v. St. John's Garage</i> (1943), 60 T. L. R. 44, 253; [1943] 2 All E. R. 690; [1944] 1 All E. R. 381	209
<i>Bonzi v. Stewart</i> (1842), 4 M. & G. 295; 5 Scott, N. R. 1, 26	81
<i>Boorman v. Brown</i> (1842), 3 Q. B. 511; 11 L. J. Ex. 437; 2 G. & D. 793; 11 C. & F. 1; 61 R. R. 287	61, 98, 104
<i>Booth v. Hodgson</i> (1795), 6 T. R. 405	81
<i>Born, Re</i> ; <i>Curnock v. Born</i> , [1900] 2 Ch. 433; 69 L. J. Ch. 669; 83 L. T. 51; 49 W. R. 23	152
<i>Borries v. Imperial Ottoman Bank</i> (1873), L. R. 9 C. P. 38; 43 L. J. C. P. 3; 29 L. T. 689; 22 W. R. 92	202
<i>Bosantquet, Ex p.</i> (1890), 45 Ch. D. 16; 62 L. T. 179	39
<i>Boschoek, etc., Co. v. Fuke</i> , [1906] 1 Ch. 148; 75 L. J. Ch. 261; 94 L. T. 398; 54 W. R. 359; 13 Manson, 100	41
<i>Bostock v. Jardine</i> (1865), 3 H. & C. 700; 34 L. J. Ex. 142; 12 L. T. 577; 11 Jur. 586; 13 W. R. 970; 140 R. R. 682	59
<i>Boston Deep Sea Fishing and Ice Co. v. Ansell</i> (1888), 39 Ch. D. 339; 59 L. T. 345 ...	113
<i>Boston Fruit Co. v. British, etc., Ins. Co.</i> , [1906] A. C. 336; 75 L. J. K. B. 537; 94 L. T. 806; 54 W. R. 557; 11 Com. Cas. 196; 22 T. L. R. 571	36
<i>Boswell v. Coaks</i> (1884), 27 Ch. D. 424; 11 App. Cas. 232	88
<i>Bottomley v. Fisher</i> (1862), 1 H. & C. 211; 31 L. J. Ex. 417	243
— <i>v. Nuttall</i> (1858), 5 C. B. 122; 28 L. J. C. P. 110; 116 R. R. 592	195
<i>Boulton, Ex p.</i> (1857), 1 De G. & J. 163; 26 L. J. Bk. 45; 118 R. R. 74; 3 Jur. 423; 5 W. R. 445	225
— <i>v. Reynolds</i> (1859), 2 E. & E. 369; 29 L. J. Q. B. 11; 119 R. R. 765; 6 Jur. 46; 8 W. R. 62; 1 L. T. 166	56
<i>Bourgogne, La</i> , [1899] A. C. 431; 68 L. J. P. 104; 80 L. T. 845; 8 Asp. M. C. 550 ...	6
<i>Bourne, Re</i> (1851), 4 De G. & S. 273; 20 L. J. Bk. 16	256
— <i>Re</i> , [1906] 2 Ch. 727; 75 L. J. Ch. 779; 95 L. T. 131; 54 W. R. 559; 50 S. J. 575	11
— <i>v. St. Marylebone Borough Council</i> (1908), 72 J. P. 129, 306	31

<i>Boursot v. Savage</i> (1866), L. R. 2 Eq. 134; 35 L. J. Ch. 627; 14 L. T. 299	225
<i>Bousfield v. Cresswell</i> (1810), 2 Camp. 545; 11 R. R. 794	79
— <i>v. Wilson</i> (1846), 16 M. & W. 185; 16 L. J. Ex. 44	81
<i>Bovine v. Dent</i> (1904), 21 T. L. R. 82.....	128, 129, 283
<i>Bow's Emporium v. Brett</i> (1927), 44 T. L. R. 194	123
<i>Bowen v. Morris</i> (1810), 2 Taunt. 374	263
<i>Bower v. Jones</i> (1831), 8 Bing. 65; 1 M. & S. 140; 1 L. J. C. P. 31.....	119
<i>Bowes, Re</i> (1886), 33 Ch. D. 586; 56 L. J. Ch. 143; 55 L. T. 260; 35 W. R. 166	149
— <i>v. Shand</i> (1877), 2 App. Cas. 455; 46 L. J. Q. B. 561; 36 L. T. 857; 25 W. R. 730	243
<i>Bowker v. Austin</i> , [1894] 1 Ch. 556; 63 L. J. Ch. 205	162
<i>Bowlby v. Bell</i> (1846), 3 C. B. 284; 16 L. J. C. P. 18	144
<i>Bowles, Re</i> (1874), 31 L. T. 365	49
— <i>v. Orr</i> (1835), 1 Y. & Coll. 464	91
<i>Bowring v. Shepherd</i> (1871), L. R. 6 Q. B. 309; 40 L. J. Q. B. 129; 24 L. T. 721; 19 W. R. 852	59, 193
<i>Boyd v. Craster</i> (1864), 10 L. T. 480; 12 W. R. 787; 140 R. R. 877	171
— <i>v. Durand</i> (1809), 2 Taunt. 161	8
— <i>v. Fitt</i> (1864), 11 L. T. 280; 14 Ir. C. L. R. 43; 148 R. R. 830	112
— <i>v. Mathers</i> (1893), 9 T. L. R. 443	121
— <i>v. Tovil Paper Co.</i> (1884), 4 T. L. R. 332	122
<i>Boyle v. Smith</i> , [1906] 1 K. B. 432; 75 L. J. K. B. 282; 94 L. T. 30; 54 W. R. 519; 70 J. P. 115; 22 T. L. R. 200	287
<i>Brace v. Calder</i> , [1895] 2 Q. B. 253; 64 L. J. Q. B. 582; 72 L. T. 829; 11 T. L. R. 450	129
<i>Bracey v. Carter</i> (1840), 12 A. & E. 373; 54 R. R. 575	135
<i>Bradbury, Ex p.</i> (1839), Mont. & Ch. 625; 4 Dea. 202	4
<i>Braddick v. Smith</i> (1832), 9 Bing. 84; 2 M. & Scott, 131; 1 L. J. C. P. 154	164
<i>Bradford v. Price</i> (1923), 92 L. J. K. B. 871; 39 T. L. R. 272	47
<i>Bradley v. Dunipace</i> (1862), 32 L. J. Ex. 22; 1 H. & C. 521; 130 R. R. 637	239
— <i>v. Riches</i> (1878), 9 Ch. D. 189; 47 L. J. Ch. 811; 38 L. T. 810	224
— <i>Egg Farm Ltd. v. Clifford</i> , [1943] 2 All E. R. 378	19, 237
<i>Bradstreets British, Ltd. v. Mitchell</i> , [1933] Ch. 190; 102 L. J. Ch. 34; 148 L. T. 111; 48 T. L. R. 670	107
<i>Brady v. Todd</i> (1861), 9 C. B. 592; 30 L. J. C. P. 223; 4 L. T. 212; 9 W. R. 483; 7 Jur. 827; 127 R. R. 797	2, 52
<i>Bramwell v. Spiller</i> (1870), 21 L. T. 672; 18 W. R. 316	262
<i>Brandao v. Barnett</i> (1846), 12 C. & F. 787; 3 C. B. 519; 69 R. R. 204	150, 159
<i>Brandon v. Hanna</i> , [1907] 2 Ir. R. 212	122
<i>Brandt v. Dunlop Rubber Co.</i> , [1905] A. C. 454; 74 L. J. K. B. 898; 93 L. T. 495; 21 T. L. R. 710	258, 259
— <i>v. Morris</i> , [1917] 2 K. B. 784; 87 L. J. K. B. 101; 117 L. T. 196	236, 245, 262
<i>Bray v. Chandler</i> (1856), 18 C. B. 718; 107 R. R. 479	120
— <i>v. Hine</i> (1818), 6 Price, 203; 20 R. R. 623	161
<i>Brazier v. Camp</i> (1894), 63 L. J. Q. B. 257; 9 R. R. 852	15
<i>Brening v. Mackie</i> (1862), 3 F. & F. 197; 130 R. R. 830	47, 205
<i>Brendon v. Spiro</i> , [1938] 1 K. B. 176; 157 L. T. 265; 53 T. L. R. 667; [1937] 2 All E. R. 496	252
<i>Brett v. Clowser</i> (1880), 5 C. P. D. 376	212
— <i>v. E. I. & L. Shipping Co.</i> (1864), 10 L. T. 187; 12 W. R. 596; 2 H. & M. 404; 144 R. R. 198	19
<i>Brettel v. Williams</i> (1849), 4 Ex. 623; 19 L. J. Ex. 121; 80 R. R. 726	172
<i>Brewer v. Jones</i> (1854), 10 Ex. 665; 24 L. J. Ex. 143; 3 C. L. R. 369; 1 Jur. 240... ..	239
— <i>v. Sparrow</i> (1827), 7 B. & C. 310; 1 M. & R. 2	41, 44
<i>Brewin v. Biscoe</i> (1859), 2 E. & E. 116; 28 L. J. Q. B. 329; 7 W. R. 584; 119 R. R. 650	224
— <i>v. Short</i> (1855), 5 E. & B. 227; 24 L. J. Q. B. 297; 103 R. R. 450	228

	PAGE
<i>Brice v. Wilson</i> (1838), 8 A. & E. 349	44
<i>Bridger v. Savage</i> (1885), 15 Q. B. D. 363; 54 L. J. Q. B. 464; 53 L. T. 129; 33 W. R. 891; 1 T. L. R. 585	81
<i>Bridges v. Garrett</i> (1870), L. R. 5 C. P. 451; 39 L. J. C. P. 251; 22 L. T. 448.....	47, 205
<i>Bridgman v. Gill</i> (1857), 24 Beav. 302; 116 R. R. 128	272
<i>Briggs v. Jones</i> (1870), L. R. 10 Eq. 92	176
<i>Bright, Ex p.</i> (1832), 2 Dea. & Ch. 8	284
— <i>Ex p.</i> (1879), 10 Ch. D. 566; 48 L. J. Bk. 81; 39 L. T. 649; 27 W. R. 385	4, 230
— <i>v. Hutton</i> (1852), 3 H. L. Cas. 341; 88 R. R. 126	16
<i>Brind v. Hampshire</i> (1836), 1 M. & W. 365	260
<i>Brinsmead v. Harrison</i> (1872), L. R. 7 C. P. 547; 41 L. J. C. P. 190; 27 L. T. 99, Ex. Ch.	217
<i>Brinson v. Davies</i> (1911), 105 L. T. 134; 27 T. L. R. 442	130
<i>Briscoe v. Briscoe</i> (1892), 2 Ch. 543; 61 L. J. Ch. 665; 67 L. T. 116; 40 W. R. 621...	152
<i>Bristow v. Taylor</i> (1817), 2 Stark. 50; 19 R. R. 675	283
— <i>v. Whitmore</i> (1861), 9 H. L. C. 391; 31 L. J. Ch. 467; 4 L. T. 622; 9 W. R. 621; 8 Jur. 291; 131 R. R. 242	40, 44
<i>Britannia Electric Lamp Works, Ltd. v. Mander & Co., Ltd.</i> , [1939] 2 K. B. 129; 108 L. J. K. B. 823; 160 L. T. 587; 55 T. L. R. 655; [1939] 2 All E. R. 469...242, 243	
<i>British Columbia Saw Mill v. Nettleship</i> (1868), L. R. 3 C. P. 499; 37 L. J. C. P. 235; 18 L. T. 291; 16 W. R. 1046	68, 220
<i>British Linen Co. v. Caledonian Ins. Co.</i> (1861), 4 Macq. 107; 9 W. R. 581; 7 Jur. 588; 4 L. T. 162; 123 R. R. 929	145
<i>British Marine, etc., Assn. v. Jenkins</i> , [1900] 1 Q. B. 299; 69 L. J. Q. B. 177; 82 L. T. 297; 9 Asp. M. C. 26; 5 Com. Cas. 143	187
<i>British Russian Gazette v. Associated Newspapers</i> , [1933] 2 K. B. 616; 102 L. J. K. B. 775; 149 L. T. 545	249
<i>British Thomson-Houston Co. v. Federated European Bank</i> , [1932] 2 K. B. 176; 101 L. J. K. B. 690; 147 L. T. 345	171
<i>Britt v. Galmoye</i> (1928), 44 T. L. R. 294; 72 S. J. 122	207
<i>Brittain v. Brown</i> (1871), 24 L. T. 504	225
— <i>v. Lloyd</i> (1845), 14 M. & W. 762; 15 L. J. Ex. 43; 69 R. R. 816	136
<i>Broad, Re</i> (1895), 15 Q. B. D. 420; 54 L. J. Q. B. 573; 52 L. T. 888.....	100
— <i>Re, Ex p. Neck</i> (1884), 13 Q. B. D. 740; 54 L. J. Q. B. 79	229
— <i>v. Thomas</i> (1830), 9 L. J. (o.s.) C. P. 32; 7 Bing. 99; 4 M. & P. 732; 4 C. & P. 338; 33 R. R. 399	118, 120, 126
<i>Broadbent v. Barlow</i> (1861), 3 De G. F. & J. 570; 30 L. J. Ch. 569	231
<i>Brooklesby v. Temperance Bldg. Soc.</i> , [1895] A. C. 173; 64 L. J. Ch. 433; 72 L. T. 477; 43 W. R. 606; 11 T. L. R. 297	177
<i>Bromley v. Holland</i> (1802), 7 Ves. 28; 6 R. R. 58	282
<i>Brook v. Hook (or Hoop)</i> (1871), L. R. 6 Ex. 89; 40 L. J. Ex. 50; 24 L. T. 34; 19 W. R. 508	34
<i>Brooke, Ex p.</i> (1869), 20 L. T. 547; 17 W. R. 665	230
— <i>v. Bool</i> , [1928] 2 K. B. 678; 97 L. J. K. B. 511; 139 L. T. 376; 72 S. J. 354; 44 T. L. R. 531	207
<i>Brooks v. Blackburn Building Society</i> (1884), 9 App. Cas. 857; 54 L. J. Ch. 376; 52 L. T. 225; 33 W. R. 309	157
— <i>v. Hassall</i> (1883), 49 L. T. 569	52
<i>Broom v. Hall</i> (1859), 7 C. B. 503; 121 R. R. 614	137
<i>Broomhead, Re</i> (1847), 5 D. & L. 52; 16 L. J. Q. B. 355; 79 R. R. 839	151, 162
<i>Broom v. Kennedy</i> (1864), 4 D. J. & S. 217; 33 L. J. Ch. 342; 140 R. R. 47	90
<i>Brouncker v. Scott</i> (1811), 4 Taun. 1	263
<i>Brown, Ex p.</i> (1891), 60 L. J. Q. B. 599; 64 L. T. 476; 7 T. L. R. 259.....	230
— <i>v. Ackroyd</i> (1856), 5 E. & B. 819; 25 L. J. Q. B. 193; 103 R. R. 762	26, 27
— <i>v. Andrew</i> (1849), 18 L. J. Q. B. 153; 83 R. R. 842	9
— <i>v. Arundell</i> (1850), 10 C. B. 54; 20 L. J. C. P. 30; 84 R. R. 457	232
— <i>v. Black</i> (1873), L. R. 8 Ch. 939; 42 L. J. Ch. 814; 29 L. T. 362; 21 W. R. 892... 193	
— <i>v. Bradford</i> (1842), 2 M. & Rob. 413.....	8

	PAGE
<i>Brown v. Byers</i> (1847), 16 M. & W. 252; 16 L. J. Ex. 112	50
— <i>v. Farebrother</i> (1888), 58 L. J. Ch. 3; 59 L. T. 822	99
— <i>v. Foot</i> (1892), 66 L. T. 649; 56 J. P. 581; 8 T. L. R. 268	287
— <i>v. Hickinbotham</i> (1881), 50 L. J. Q. B. 426	270
— <i>v. Law</i> (1895), 72 L. T. 779; 11 T. L. R. 395	249
— <i>v. Powell Duffryn Coal Co.</i> (1875), L. R. 10 C. P. 562; 44 L. J. C. P. 289; 32 L. T. 621; 23 W. R. 549	68
— <i>v. Southouse</i> (1790), 3 Bro. C. C. 107	115
— <i>v. Staton</i> (1816), 2 Chit. 353; 23 R. R. 750	62, 99
— <i>v. Tombs</i> , [1891] 1 Q. B. 253; 60 L. J. Q. B. 38; 64 L. T. 114; 7 T. L. R. 49... ..	70
<i>Browning v. Provincial Ins. Co.</i> (1873), L. R. 5 P. C. 263; 28 L. T. 853; 21 W. R. 587... ..	185
<i>Brummell v. M'Pherson</i> (1828), 5 Russ. 263; 7 L. J. (o.s.) Ch. 1	283
<i>Brunswick & Crowl, Re</i> (1849), 4 Ex. 492; 19 L. J. Ex. 112	131
<i>Brunton v. Electric Engineering Corp.</i> , [1892] 1 Ch. 434; 61 L. J. Ch. 256; 65 L. T. 745; 8 T. L. R. 158	157
<i>Bryans v. Nix</i> (1839), 4 M. & W. 775; 1 H. & H. 480; 8 L. J. Ex. 137; 51 R. R. 819... ..	148
<i>Bryant v. Flight</i> (1839), 5 M. & W. 114	119
— <i>v. La Banque du Peuple</i> , [1893] A. C. 170; 62 L. J. P. C. 68; 68 L. T. 546; 41 W. R. 600; 9 T. L. R. 322	49
— <i>v. Quebec Bank</i> , [1893] A. C. 179; 62 L. J. P. C. 73; 68 L. T. 549; 41 W. R. 602	169, 183
<i>Brydges v. Branfill</i> (1841), 12 Sim. 369; 56 R. R. 71	267
<i>Buchanan v. Findlay</i> (1829), 7 L. J. (o.s.) K. B. 314; 9 B. & C. 738; 4 M. & R. 593... ..	150
<i>Buck, Ex p.</i> (1876), 3 Ch. D. 795; 34 L. T. 807	147, 228
— <i>v. Rawlinson</i> (1704), 1 Bro. P. C. 137	239
<i>Buckley, Ex p.</i> (1845), 14 M. & W. 469; 14 L. J. Ex. 341; 69 R. R. 735	190, 241
<i>Budberg v. Jerwood</i> (1934), 78 S. J. 878; 57 T. L. R. 99	3
<i>Buitenlandsche Bankvereniging v. Hildensheim</i> (1903), 19 T. L. R. 641	143
<i>Bulfield v. Fournier</i> (1896), 11 T. L. R. 282	113
<i>Bulkeley v. Dunbar</i> (1792), 1 Anstr. 37	267
<i>Bulkey v. Wilford</i> (1834), 2 C. & F. 102; 8 Bli. (n.s.) 111; 37 R. R. 39	109
<i>Bull v. Price</i> (1831), 5 M. & P. 2; 7 Bing. 237; 9 L. J. (o.s.) C. P. 78	126
<i>Bull & Co. v. West African Shipping, etc., Co.</i> , [1927] A. C. 686; 96 L. J. P. C. 127; 137 L. T. 498; 43 T. L. R. 548	213
<i>Bullen v. Swan Electric Engraving Co.</i> (1907), 23 T. L. R. 257	79, 107
<i>Buller v. Harrison</i> (1777), Cowp. 565	257
<i>Bulley v. Bulley</i> (1878), 8 Ch. D. 479; 47 L. J. Ch. 841	153
<i>Bulmer v. Gilman</i> (1842), 4 M. & G. 108; 61 R. R. 487	108
<i>Bultfontein, etc., Mines, Re</i> (1897), 75 L. T. 669	277
<i>Bunbury v. Hibernian Bank</i> , [1908] 1 Ir. R. 261	222
<i>Burbidge v. Morris</i> (1865), 3 H. & C. 664; 34 L. J. Ex. 131; 12 L. T. 426; 13 W. R. 92; 140 R. R. 669	16
<i>Burchell v. Gowrie, etc., Collieries</i> , [1910] A. C. 614; 80 L. J. P. C. 41; 103 L. T. 325	122
<i>Burdett v. Willett</i> (1708), 2 Vern. 628	229
<i>Burdick v. Garrick</i> (1869), L. R. 5 Ch. 233; 39 L. J. Ch. 369; 18 W. R. 387	77, 115
<i>Burge, Re</i> , [1912] 1 K. B. 393; 81 L. J. K. B. 721; 106 L. T. 47; 20 Manson, 11... ..	228
— <i>v. Ashley</i> , [1900] 1 Q. B. 744; 69 L. J. Q. B. 538; 82 L. T. 518; 48 W. R. 438... ..	284
<i>Burgess's Case</i> (1880), 15 Ch. D. 507; 49 L. J. Ch. 541; 43 L. T. 45; 28 W. R. 792... ..	199
<i>Burgoine v. Taylor</i> (1878), 9 Ch. D. 1; 47 L. J. Ch. 542; 38 L. T. 438; 26 W. R. 568... ..	109
<i>Burgon v. Sharpe</i> (1810), 2 Camp. 529; 11 R. R. 788	68
<i>Burgos v. Nascimento</i> (1909), 100 L. T. 71; 11 Asp. M. C. 181	262
<i>Burland v. Earle</i> , [1902] A. C. 83; 71 L. J. P. C. 1; 85 L. T. 553; 50 W. R. 241; 9 Manson, 17	97
<i>Burlington, The</i> (1896), 72 L. T. 890	208
<i>Burmester v. Norris</i> (1851), 6 Ex. 796; 21 L. J. Ex. 43	55

<i>Burn v. Brown</i> (1817), 2 Stark. 272; 19 R. R. 719	151
— <i>v. Burn</i> (1798), 3 Ves. 578	31
— <i>v. Carvalho</i> (1839), 4 Myl. & C. 690; 9 L. J. Ch. 65; 3 Jur. 1141; 48 R. R. 213... ..	276
<i>Burnand, Re</i> , [1904] 2 K. B. 68; 73 L. J. K. B. 413; 91 L. T. 46; 52 W. R. 437; 20 T. L. R. 377; 11 Manson, 113	76, 228
<i>Burnes v. Pennell</i> (1849), 2 H. L. C. 497; 13 Jur. 897; 81 R. R. 244	175
<i>Burnett v. Bouch</i> (1840), 9 C. & P. 620	118
<i>Burnside v. Cayrell</i> (1849), 3 Ex. 224; 19 L. J. Ex. 46; 77 R. R. 612	14
<i>Buron v. Denman</i> (1848), 2 Ex. 167; 76 R. R. 554	33, 43, 267
<i>Burrell v. Jones</i> (1819), 3 B. & A. 47; 22 R. R. 296	245
— <i>v. Mossop</i> (1888), 4 T. L. R. 270	93
<i>Burrough v. Skinner</i> (1770), 5 Burr. 2639	98, 257
<i>Burt v. Bull</i> , [1895] 1 Q. B. 276; 64 L. J. Q. B. 232; 71 L. T. 810; 43 W. R. 180; 11 T. L. R. 90	12
— <i>v. Palmer</i> (1804), 5 Esp. 145	200, 221
<i>Burton v. Hughes</i> (1885), 1 T. L. R. 207	122
— <i>v. Wookey</i> (1822), 6 Madd. 367; 23 R. R. 249	84
<i>Butchart v. Dresser</i> (1853), 4 D. M. & G. 542; 10 Hare, 453; 1 W. R. 178; 102 R. R. 269	11
<i>Butler v. Knight</i> (1867), L. R. 2 Ex. 109; 36 L. J. Ex. 66; 15 L. T. 621; 15 W. R. 407	63, 64, 99, 104, 169, 274
<i>Butwick v. Grant</i> , [1924] 2 K. B. 483; 93 L. J. K. B. 972; 131 L. T. 476	202
<i>Byrne v. Londonderry Tram. Co.</i> , [1902] 2 Ir. R. 457	172
<i>CAHILL v. Dawson</i> (1857), 3 C. B. (N.S.) 106; 26 L. J. C. P. 253; 111 R. R. 565	159
<i>Caine v. Horsefall</i> (1847), 1 Ex. 519; 17 L. J. Ex. 25; 74 R. R. 748	118
<i>Calder v. Dobell</i> (1871), L. R. 6 C. P. 486; 40 L. J. C. P. 224; 25 L. T. 129; . 19 W. R. 978	186, 196
<i>Cale v. James</i> , [1897] 1 Q. B. 418; 66 L. J. Q. B. 249; 76 L. T. 119; 45 W. R. 317; 61 J. P. 230	26
<i>Calico Printers' Association v. Barclays Bank</i> (1931), 145 L. T. 51; 36 Com. Cas. 197; 39 Ll. L. Rep. 51	71
<i>Callan, Ex p.</i> (1886), 32 Ch. D. 337; 55 L. J. Ch. 540; 54 L. T. 912; 34 W. R. 505; 2 T. L. R. 541	30
<i>Callander v. Oelricks</i> (1839), 5 Bing. N. C. 58; 6 Scott, 761; 8 L. J. C. P. 25; 50 R. R. 602	78
<i>Callot v. Nash</i> (1923), 39 T. L. R. 292	21, 28
<i>Callow v. Kelson</i> (1862), 10 W. R. 193; 125 R. R. 944	176
<i>Cameron v. Nystrom</i> , [1893] A. C. 308; 62 L. J. P. C. 85; 68 L. T. 772	213
<i>Campanari v. Woodburn</i> (1854), 15 C. B. 400; 3 C. L. R. 140; 24 L. J. C. P. 13; 100 R. R. 406	132, 279, 283
<i>Campbell v. Hassel</i> (1816), 1 Stark. 233	58, 61, 202
— <i>v. Hicks</i> (1858), 28 L. J. Ex. 70; 118 R. R. 898	195
— <i>v. Hooper</i> (1855), 3 Sm. & G. 153; 24 L. J. Ch. 644; 107 R. R. 59	4
— <i>v. Larkworthy</i> (1894), 9 T. L. R. 528	135
<i>Canadian Pacific Ry. Co. v. Lockhart</i> , [1942] A. C. 591; 111 L. J. P. C. 113; 167 L. T. 231; [1942] 2 All E. R. 464	209
<i>Cane v. Allen</i> (1814), 2 Dow, 289	89
<i>Cannan v. Meaburn</i> (1823), 1 L. J. (o.s.) C. P. 84; 2 L. J. (o.s.) C. P. 60; 1 Bing. 243, 465; 8 Moo. 127, 633	67, 209
<i>Canterbury v. Att.-Gen.</i> (1842), 1 Ph. 306; 12 L. J. Ch. 281; 65 R. R. 393	205
<i>Cape Breton Co., Re</i> (1884), 26 Ch. D. 221; 29 Ch. D. 795; 1 T. L. R. 450	86, 96
<i>Capel v. Thornton</i> (1828), 3 C. & P. 352; 33 R. R. 678	51
<i>Capital and Counties Bank v. Gordon</i> , [1903] A. C. 240; 72 L. J. K. B. 451; 88 L. T. 574; 51 W. R. 671; 8 Com. Cas. 221	272
<i>Capital Fire Ins. Ass., Re</i> (1883), 24 Ch. D. 408; 53 L. J. Ch. 71; 49 L. T. 697; 32 W. R. 280	157, 163

	PAGE
<i>Capp v. Topham</i> (1806), 6 East, 392; 2 Smith, 443.....	145
<i>Carbis, Ex p.</i> (1834), 4 Dea. & Ch. 354	225
<i>Carew's Estate Act, Re</i> (1862), 31 Beav. 39; 135 R. R. 338	226
<i>Cargill v. Bower</i> (1878), 10 Ch. D. 502; 47 L. J. Ch. 649; 38 L. T. 779; 26 W. R. 716... 273	
<i>Carlow, Ex p.</i> (1834), 2 Mont. & A. 39	228, 229
<i>Carmichael's Case</i> , [1896] 2 Ch. 643; 65 L. J. Ch. 902; 75 L. T. 45	277
<i>Carmichael v. Rudkin</i> (1897), 13 T. L. R. 153	228, 229
<i>Carolina Bank v. Case</i> (1828), 8 B. & C. 427; 2 M. & R. 459.....	190
<i>Carr v. Hinchliff</i> (1825), 4 L. J. K. B. 5; 4 B. & C. 547; 7 D. & R. 42	202
— <i>v. Jackson</i> (1852), 7 Ex. 382; 21 L. J. Ex. 137; 86 R. R. 699.....	248
<i>Carriage, etc. Supply Ass., Re</i> (1884), 27 Ch. D. 322; 51 L. T. 286; 53 L. J. Ch. 1154; 33 W. R. 411	96
<i>Carstairs v. Bates</i> (1812), 3 Camp. 301	229
<i>Carter, Re</i> (1886), 55 L. J. Ch. 230; 53 L. T. 630; 34 W. R. 57	162
— <i>v. Palmer</i> (1841), 8 Cl. & F. 657; 54 R. R. 145	93
— <i>v. St. Mary Abbott's Vestry</i> (1900), 64 J. P. 548	42
— <i>v. White</i> (1883), 25 Ch. D. 666; 54 L. J. Ch. 138; 50 L. T. 670; 32 W. R. 692... 278	
<i>Cartmell's Case</i> (1874), L. R. 9 Ch. 691; 43 L. J. Ch. 588; 31 L. T. 52; 22 W. R. 692... 70	
<i>Cartwright v. Hateley</i> (1791), 1 Ves. jun. 292; 3 Bro. C. C. 238	72
<i>Caruthers v. Graham</i> (1811), 14 East, 578	124
<i>Cary v. Webster</i> (1731), 1 Str. 480	256
<i>Case v. McClellan</i> (1872), 25 L. T. 753; 20 W. R. 113	191
<i>Casey v. Bentley</i> , [1902] 1 Ir. R. 376	192
<i>Cass v. Rudele</i> (1692), 2 Vern. 280	240
— <i>v. Spurr</i> (1870), L. R. 5 Q. B. 656; 39 L. J. Q. B. 249; 23 L. T. 409.....	186
<i>Cassaboglou v. Gibb</i> (1882), 11 Q. B. D. 797; 52 L. J. Q. B. 538; 48 L. T. 850	110
<i>Castle v. Duke</i> (1832), 5 C. & P. 359	247
<i>Castlegate, The</i> , [1893] A. C. 38; 62 L. J. P. C. 17; 68 L. T. 99; 41 W. R. 349; 9 T. L. R. 139	155
<i>Castrique v. Buttigieg</i> (1855), 10 Moo. P. C. C. 94; 110 R. R. 2	103
<i>Catlin v. Bell</i> (1815), 4 Camp. 183.....	70
<i>Catlow v. Catlow</i> (1877), 2 C. P. D. 362; 25 W. R. 866	152
<i>Catterall v. Hindle</i> (1867), L. R. 2 C. P. 368	205
<i>Cave v. Cave</i> (1880), 15 Ch. D. 639; 49 L. J. Ch. 505; 42 L. T. 730; 28 W. R. 798 ... 224	
— <i>v. Mackenzie</i> (1877), 46 L. J. Ch. 564; 37 L. T. 218	30
<i>Cavendish-Bentinck v. Fenn</i> (1887), 12 A. C. 652	86, 97
<i>Cawthron v. Trickett</i> (1864), 15 C. B. 754; 33 L. J. C. P. 182; 9 L. T. 609; 12 W. R. 311; 137 R. R. 748.....	263
<i>Cella, The</i> (1888), 13 P. D. 82; 57 L. J. Ad. 55; 59 L. T. 125	155, 162
<i>Central Motors (Glasgow), Ltd. v. Cessnock Garage, etc.</i> , [1925] S. C. 796	210
<i>Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board</i> , [1942] A. C. 509; 111 L. J. P. C. 138; 167 L. T. 404; [1942] 1 All E. R. 491	210, 213
<i>Ceylon Coaling Co. v. Goodrich</i> , [1904] P. 319; 73 L. J. P. 104; 91 L. T. 151; 9 Asp. M. C. 606	242
<i>Chadburn v. Moore</i> (1892), 61 L. J. Ch. 674; 67 L. T. 257; 41 W. R. 39.....	57, 75, 173
<i>Chadwick v. Maden</i> (1851), 21 L. J. Ch. 876; 9 Hare, 188; 89 R. R. 391	237, 243
<i>Chambers v. Mason</i> (1858), 5 C. B. (N.S.) 59; 28 L. J. C. P. 10; 116 R. R. 569; 5 Jur. 148	62
<i>Champernown v. Scott</i> (1821), 6 Madd. 93; 22 R. R. 248	151
<i>Champion v. Rigby</i> (1830), 1 Russ. & M. 539; Tamlyn, 421; 9 L. J. (o.s.) Ch. 211; 31 R. R. 107	87
<i>Chaney v. Maclow</i> , [1929] 1 Ch. 461; 98 L. J. Ch. 345; 140 L. T. 312; 45 T. L. R. 135.....	13
<i>Chapleo v. Brunswick Building Soc.</i> (1881), 6 Q. B. D. 696; 50 L. J. Q. B. 372; 44 L. T. 449; 20 W. R. 529	250
<i>Chaplin v. Cave. See Cave v. Cave</i>	224

	PAGE
Chapman, <i>Re</i> (1884), 13 Q. B. D. 747; 51 L. T. 881; 33 W. R. 268	266
— <i>v.</i> Shepherd (1867), L. R. 2 C. P. 228; 36 L. J. C. P. 113; 15 L. T. 477; 15 W. R. 314	139
— <i>v.</i> Smethurst, [1909] 1 K. B. 927; 78 L. J. K. B. 654; 100 L. T. 465; 25 T. L. R. 383	243
— <i>v.</i> Smith, [1907] 2 Ch. 97; 76 L. J. Ch. 394; 96 L. T. 662	189, 241
— <i>v.</i> Van Toll (1857), 8 E. & B. 396; 27 L. J. Q. B. 1; 112 R. R. 619	108
— <i>v.</i> Westerby, [1913] W. N. 277; 58 S. J. 50	19
— <i>v.</i> Winson (1904), 91 L. T. 17; 53 W. R. 19; 20 T. L. R. 663	125, 126
Charles Amelia, <i>The</i> (1868), L. R. 2 Ad. 330; 38 L. J. Ad. 17; 19 L. T. 429	155
Charleston <i>v.</i> London Tram. Co. (1888), 36 W. R. 367; 4 T. L. R. 157, 629	216
Charlotte, <i>The</i> (1861), Lush. 252; 30 L. J. Ad. 145; 5 L. T. 141	39, 41, 67
Charlton <i>v.</i> Charlton (1883), 52 L. J. Ch. 971; 49 L. T. 267	153
Charlwood, <i>Re</i> , [1894] 1 Q. B. 643; 63 L. J. Q. B. 344; 70 L. T. 383; 10 T. L. R. 317	281
Charter <i>v.</i> Trevelyan (1842), 11 C. & F. 714; 8 Jur. 1015; 65 R. R. 305; 4 L. J. Ch. 209	87
Chartered Bank of India <i>v.</i> Evans (1869), 21 L. T. 407	278
Chatteris, <i>Ex p.</i> (1874), 22 W. R. 289	121
Chedworth <i>v.</i> Edwards (1802), 8 Ves. 48; 6 R. R. 212	115
Cherry <i>v.</i> Conolian Bank (1869), 38 L. J. P. C. 49; 21 L. T. 356; 17 W. R. 1031	240, 250
Cheshire <i>v.</i> Bailey, [1905] 1 K. B. 237; 74 L. J. K. B. 176; 92 L. T. 142; 53 W. R. 322; 21 T. L. R. 130	210
— <i>v.</i> Vaughan, [1920] 2 K. B. 240; 89 L. J. K. B. 1168; 123 L. T. 487; 84 J. P. 233; 25 Com. Cas. 242	107
Chesterfield Colliery Co. <i>v.</i> Black (1878), 37 L. T. 740; 26 W. R. 207	88
— <i>v.</i> Hawkins (1865), 3 H. & C. 677; 11 Jur. 468; 34 L. J. Ex. 121; 12 L. T. 427; 13 W. R. 840; 140 R. R. 677	188
Childers <i>v.</i> Wooler (1860), 2 E. & E. 287; 29 L. J. Q. B. 129; 119 R. R. 725	269
China Mutual Steam Nav. Co. <i>v.</i> Maclay, [1918] 1 K. B. 33; 87 L. J. K. B. 95; 117 L. T. 821; 34 T. L. R. 81	269
Chinnoek <i>v.</i> Sainsbury (1860), 80 L. J. Ch. 409; 9 W. R. 7; 3 L. T. 258	276
Chisholm <i>v.</i> Doulton (1889), 22 Q. B. D. 736; 58 L. J. M. C. 133; 60 L. T. 966; 37 W. R. 749; 5 T. L. R. 437	288
Cholmondeley <i>v.</i> Clinton (1815), 19 Ves. 261; 13 R. R. 183	100
Chown <i>v.</i> Parrott (1863), 14 C. B. 74; 32 L. J. C. P. 197; 8 L. T. 391; 11 W. R. 698; 9 Jur. 1290; 135 R. R. 611	63, 104
Christoffersen <i>v.</i> Hansen (1872), L. R. 7 Q. B. 509; 41 L. J. Q. B. 217; 26 L. T. 547; 20 W. R. 626	240
Christoforides <i>v.</i> Terry, [1924] A. C. 566; 93 L. J. K. B. 481; 131 L. T. 84; 40 T. L. R. 485	141
Church <i>v.</i> Imperial Gaslight Co. (1838), 6 A. & E. 846; 3 N. & P. 35; 7 L. J. Q. B. 118; 45 R. R. 638	31, 32
Churchill <i>v.</i> Goddard, [1937] 1 K. B. 92; 105 L. J. K. B. 571; 154 L. T. 586; 41 Com. Cas. 309; 80 S. J. 285; 54 Ll. L. R. 279; [1936] 1 All E. R. 675	3, 264
Chybassa, <i>The</i> , [1919] P. 201; 88 L. J. P. 191	208
Cinnamon Park Co., <i>Re</i> , [1930] N. Ir. 47	35
Citizens' Bank <i>v.</i> National Bank (1874), L. R. 6 H. L. 352; 43 L. J. Ch. 269	258
Citizens' Life Ass. Co. <i>v.</i> Brown, [1904] A. C. 423; 73 L. J. P. C. 102; 90 L. T. 739; 53 W. R. 176; 20 T. L. R. 497	217
City Bank <i>v.</i> Barrow (1880), 5 App. Cas. 664; 43 L. T. 393	57
City of Calcutta, <i>The</i> (1899), 79 L. T. 517; 8 Asp. M. C. 442	65
Civilian War Claimants Assoc. <i>v.</i> R., [1932] A. C. 14; 101 L. J. K. B. 105; 146 L. T. 169; 75 S. J. 813; 48 T. L. R. 83	6
Clack <i>v.</i> Wood (1882), 9 Q. B. D. 276; 47 L. T. 144; 30 W. R. 931	126
Clanricarde <i>v.</i> Henning (1860), 30 Beav. 175; 30 L. J. Ch. 865; 7 Jur. 1113; 5 L. T. 169; 9 W. R. 912; 132 R. R. 227	87

	PAGE
Clark, <i>Ex p.</i> (1869), L. R. 7 Eq. 550; 38 L. J. Ch. 562; 20 L. T. 774	129
—, <i>Re</i> (1876), 4 Ch. D. 515; 35 L. T. 916; 25 W. R. 275	152
— <i>v.</i> Hoskins (1867), 36 L. J. Ch. 689; 16 L. T. 730; 15 W. R. 1161	267
— <i>v.</i> Smith (1844), 6 M. & G. 1051	154
Clarke, <i>Re</i> (1851), 1 D. M. & G. 43; 21 L. J. Ch. 20; 91 R. R. 24	99, 135
— <i>v.</i> Cuckfield (1852), 21 L. J. Q. B. 349; 1 B. C. C. 81; 16 Jur. 686; 16 J. P. 257; 19 L. T. 207; 91 R. R. 891	31
— <i>v.</i> L. & C. Banking Co., [1897] 1 Q. B. 552; 66 L. J. Q. B. 354; 76 L. T. 293; 45 W. R. 383	271
— <i>v.</i> Palmer (1882), 21 Ch. D. 124; 51 L. J. Ch. 634; 48 L. T. 857	176
— <i>v.</i> Perrier (1879), 2 Freem. 48	40, 43
— <i>v.</i> Tipping (1846), 9 Beav. 284; 73 R. R. 355	76, 91, 97
Clay <i>v.</i> Southern (1852), 7 Ex. 717; 21 L. J. Ex. 202	262
Clay Hill Brick and Tile Co., Ltd. <i>v.</i> Rawlings, [1938] 4 All E. R. 100; 159 L. T. 482... ..	47
Clayton, <i>Re</i> (1905), 92 L. T. 223	152
Clelland <i>v.</i> Edward Lloyd, Ltd., [1938] 1 K. B. 272; 106 L. J. K. B. 626; 157 L. T. 236; 53 T. L. R. 644; [1937] 2 All E. R. 605	213
Cleverton <i>v.</i> Uffernel (1887), 3 T. L. R. 509	224
Clifford <i>v.</i> Laton (1827), 3 C. & P. 15; M. & M. 101	21, 23, 24
Clinan <i>v.</i> Cooke (1802), 1 Sch. & Lef. 22; 9 R. R. 3	30
Clink <i>v.</i> Radford, [1891] 1 Q. B. 625; 60 L. J. Q. B. 338; 64 L. T. 491; 39 W. R. 355... ..	240
Clissold <i>v.</i> Cratchley, [1910] 2 K. B. 244; 79 L. J. K. B. 635; 102 L. T. 520; 26 T. L. R. 409	208, 269
Close <i>v.</i> Phipps (1844), 7 M. & G. 586	256
Clough, <i>Re</i> (1885), 55 L. J. Ch. 77; 31 Ch. D. 324; 53 L. T. 716; 2 T. L. R. 75; 34 W. R. 96	11
Clover <i>v.</i> Adams (1881), 6 Q. B. D. 622	152
Clutterbuck <i>v.</i> Coffin (1842), 3 M. & G. 842; 4 Scott, N. R. 509; Car. & M. 273; 11 L. J. C. P.; 60 R. R. 628	234
Clutton <i>v.</i> Pardon (1823), T. & R. 301; 24 R. R. 68	151
Coates <i>v.</i> Lewes (1808), 1 Camp. 444; 10 R. R. 725	202
— <i>v.</i> Pacey (1892), 8 T. L. R. 474	140, 141
Cobb <i>v.</i> Becke (1845), 6 Q. B. 930; 14 L. J. Q. B. 108; 66 R. R. 606	73
Cobequid Marine Ins. Co. <i>v.</i> Barteaux (1875), L. R. 6 P. C. 319; 32 L. T. 510; 23 W. R. 892	67
Cobridge S.S. Co. and Bucknall S.S. Lines, <i>Re</i> (1910), 15 Com. Cas. 138	104
Cochrane <i>v.</i> Rymill (1879), 40 L. T. 744; 27 W. R. 776	270, 271
Cockayne <i>v.</i> Harrison (1873), L. R. 15 Eq. 298; 42 L. J. Ch. 660; 21 W. R. 520	155
Cockburn <i>v.</i> Edwards (1881), 18 Ch. D. 449; 51 L. J. Ch. 46	89, 100
Cockerell <i>v.</i> Aucompte (1857), 2 C. B. (n.s.) 440; 26 L. J. C. P. 194; 109 R. R. 748... ..	16
Cockran <i>v.</i> Irlam (1813), 2 M. & S. 301; 15 R. R. 257	60, 61, 70, 97
Cockrells Estate, <i>Re</i> , [1912] 1 Ch. 23; 81 L. J. Ch. 152; 105 L. T. 662	152
Codrington <i>v.</i> Lloyd (1838), 8 A. & E. 449; 3 N. & P. 442	269
Coe <i>v.</i> Wise (1866), L. R. 1 Q. B. 711; 37 L. J. Q. B. 262; 14 L. T. 891; 7 B. & S. 831; 14 L. T. 891; 14 W. R. 865; 147 R. R. 484	214
Coggs <i>v.</i> Bernard, 2 Ld. Raym. 909, 918	74, 97
Cohen <i>v.</i> Kittell (1889), 22 Q. B. D. 680; 58 L. J. Q. B. 241; 60 L. T. 932; 37 W. R. 400; 5 T. L. R. 345	107
— <i>v.</i> Kushke (1900), 83 L. T. 102	92, 112
— <i>v.</i> Paget (1814), 4 Camp. 96	118
Cole <i>v.</i> Eley, [1894] 2 Q. B. 350; 63 L. J. Q. B. 682; 70 L. T. 892; 42 W. R. 561; 10 T. L. R. 515	153
— <i>v.</i> North Western Bank (1875), L. R. 10 C. P. 354; 32 L. T. 733; 44 L. J. C. P. 233	2
Coleman <i>v.</i> Bucks and Oxon Bank, [1897] 2 Ch. 243; 66 L. J. Ch. 564; 76 L. T. 684; 45 W. R. 616	273
— <i>v.</i> Mellersh (1850), 2 Mac. & G. 309; 86 R. R. 123	91

	PAGE
Coles v. Bell (1808), 1 Camp. 478, n.; 10 R. R. 371	38
— v. Bristowe (1868), L. R. 4 Ch. 3; 38 L. J. Ch. 81; 19 L. T. 403; 17 W. R. 105	59, 193
— v. Enoch, [1939] 3 All E. R. 327; 83 S. J. 603	123
— v. Trecothick (1804), 9 Ves. 234; 1 Smith, 233; 7 R. R. 167	30, 70, 98
Colgett v. Norrish (1886), 2 T. L. R. 471	224
Collen v. Gardner (1856), 21 Beav. 540; 111 R. R. 195	54, 175
— v. Wright (1857), 8 E. & B. 647; 27 L. J. Q. B. 215; 4 Jur. 357; 6 W. R. 123; 30 L. T. 209; 110 R. R. 611	249, 254
Collins v. Associated Greyhound Racecourses, [1930] 1 Ch. 1; 99 L. J. Ch. 52; 141 L. T. 529; 45 T. L. R. 519	185
— v. Cory, [1901] 17 T. L. R. 242	25
— v. Evans (1844), 13 L. J. Q. B. 180; 5 Q. B. 820; 8 Jur. 345; D. & M. 669; 64 R. R. 656	269
— v. Griffin (1734), Barnes, 37	116
— v. Hare (1828), 2 Bli. (n.s.) 106; 1 D. & C. 139	87
Collinson v. Lister (1855), 25 L. J. Ch. 38; 7 D. M. & G. 634; 109 R. R. 267; 2 Jur. 75; 4 W. R. 133	200
Collman v. Mills, [1897] 1 Q. B. 396; 66 L. J. Q. B. 170; 75 L. T. 590; 61 J. P. 102; 13 T. L. R. 122	287
Collyer v. Dudley (1823), T. & R. 421	76
Colmer v. Ede (1870), 40 L. J. Ch. 185; 23 L. T. 884; 19 W. R. 318	152
Colonial Bank v. Cady (1890), 15 A. C. 267; 60 L. J. Ch. 131; 63 L. T. 27; 39 W. R. 17; 6 T. L. R. 329	227
— v. Exchange Bank (1885), 11 A. C. 84; 55 L. J. P. C. 14; 54 L. T. 256; 34 W. R. 417	286
— v. Whinney (1886), 11 A. C. 426; 56 L. J. Ch. 43; 55 L. T. 362; 34 W. R. 705; 2 T. L. R. 747	230
Colonial Bank of Australasia v. Marshall, [1906] A. C. 559; 75 L. J. P. C. 76; 95 J. L. 310; 22 T. L. R. 746	145
Colvin v. Hartwell (1837), 5 C. & F. 484	150
— v. Newberry (1832); 1 C. & F. 283; 6 Bli. 167; 7 Bing. 190; 4 M. & P. 876; 1 C. & J. 192; 1 Tyr. 55; 33 R. R. 437	65
Colyer v. Finch (1856), 5 H. L. C. 905; 26 L. J. Ch. 65; 101 R. R. 442	176
Combe's Case, 9 Co. Rep. 75	4, 70, 76
Comber v. Anderson (1808), 1 Camp. 523	74, 104, 106
Comerford v. Britannic Assurance Co. (1908), 24 T. L. R. 593	173
Commonwealth Land, etc., Co., Re (1873), 43 L. J. Ch. 99; 29 L. T. 502; 22 W. R. 106	63
Commonwealth Portland Cement Co. v. Weber, [1905] A. C. 66; 74 L. J. P. C. 25; 91 L. T. 813; 53 W. R. 337; 10 Asp. M. C. 27; 21 T. L. R. 149	105
Compania Naviera Vasconzada v. Churchill, [1906] 1 K. B. 237; 75 L. J. K. B. 94; 94 L. T. 59; 54 W. R. 406; 11 Com. Cas. 49; 22 T. L. R. 85	170, 219
Concordia, etc. v. Squire (1876), 34 L. T. 824	195
Condy v. Blaiberg (1891), 55 J. P. 580; 7 T. L. R. 424	208
Conlon v. Muldowney, [1904] 2 Ir. R. 498	286
Connelly v. Lawson (1876), 34 L. T. 903	25
Connors v. London and Prov. Ass. Co. (1913), 47 Ir. L. T. 148	174
Consett v. Bell (1841), 1 Y. & Coll. C. C. 569; 57 R. R. 451	87
Consolidated Co. v. Curtis, [1892] 1 Q. B. 495; 61 L. J. Q. B. 325; 40 W. R. 426; 56 J. P. 565	270
Consolidated Goldfields v. Spiegel (1909), 100 L. T. 351; 14 Com. Cas. 61; 25 T. L. R. 275	59
Consort, etc., Gold Mines, Re, [1897] 1 Ch. 575; 66 L. J. Ch. 297; 76 L. T. 300	277
Cook, Re, [1899] 1 Q. B. 863; 68 L. J. Q. B. 597; 80 L. T. 495; 47 W. R. 524; 6 Manson, 185	152
—, Re, ex p. Vernal (1892), 10 Morrell, 8	20

	PAGE
<i>Cook v. Deeks</i> , [1916] 1 A. C. 554; 85 L. J. P. C. 161; 114 L. T. 636.....	97
— <i>v. Ward</i> (1877), 2 C. P. D. 255; 36 L. T. 893; 25 W. R. 593	70
<i>Cooke, Ex p.</i> (1876), 4 Ch. D. 123; 46 L. J. Bk. 52; 35 L. T. 649; 25 W. R. 171.....	228
—, <i>Ex p., re Cotton</i> (1913), 57 S. J. 174	228
— <i>v. Eshelby</i> (1887), 12 App. Cas. 271; 56 L. J. Q. B. 505; 56 L. T. 673; 35 W. R. 629; 3 T. L. R. 481.....	203
— <i>v. Wilson</i> (1856), 1 C. B. 153; 26 L. J. C. P. 15; 107 R. R. 607	243, 262
<i>Cooper v. De Tastet</i> (1829), Tamlyn, 177	82, 164
— <i>v. Lloyd</i> (1859), 6 C. B. 519; 33 L. T. 149; 120 R. R. 253	27
— <i>v. Metropolitan Board of Works</i> (1883), 25 Ch. D. 472; 53 L. J. Ch. 109; 50 L. T. 602; 32 W. R. 709	221
— <i>v. Stephenson</i> (1852), 21 L. J. Q. B. 292; 91 R. R. 879	109
— <i>v. Strauss</i> (1898), 14 T. L. R. 233	202
<i>Coore v. Callaway</i> (1794), 1 Esp. 115	38
<i>Coote v. Whittington</i> (1873), L. R. 16 Eq. 534; 42 L. J. Ch. 846; 29 L. T. 206	268
<i>Cope v. Thames Haven Dock Co.</i> (1849), 3 Ex. 841; 18 L. J. Ex. 345; 77 R. R. 859... ..	32
<i>Copland v. Stein</i> (1799), 8 T. R. 199	158
<i>Coppen v. Moore</i> , [1898] 2 Q. B. 306; 67 L. J. Q. B. 689; 78 L. T. 520; 46 W. R. 620; 62 J. P. 453; 19 Cox, C. C. 45	287
<i>Coppin v. Craig</i> (1816), 2 Marsh. 501; 7 Taunt. 243; 17 R. R. 508.....	265
— <i>v. Walker</i> (1816), 2 Marsh. 497; 7 Taunt. 237; 17 R. R. 505	265
<i>Corlett v. Gordon</i> (1813), 3 Camp. 472; 14 R. R. 813.....	75
<i>Cormack v. Digby</i> (1876), Ir. R. 9 C. L. 557	211
<i>Cornfoot v. Fowke</i> (1840), 9 L. J. Ex. 297; 6 M. & W. 358; 4 Jur. 919; 55 R. R. 655... ..	212
<i>Cornford v. Carlton Bank</i> , [1899] 1 Q. B. 392; [1900] 1 Q. B. 22; 68 L. J. Q. B. 196, 1020; 80 L. T. 121; 81 L. T. 415	217
<i>Cornwal v. Wilson</i> (1760), 1 Ves. 510	41, 43, 44
<i>Cortis v. Kent Waterworks Co.</i> (1827), 7 B. & C. 314	9
<i>Cory v. Lambton</i> (1917), 86 L. J. K. B. 401; 115 L. T. 738	142
— <i>v. Patton</i> (1874), L. R. 9 Q. B. 577; 43 L. J. Q. B. 181; 30 L. T. 758; 23 W. R. 46	37, 200
<i>Costa Rica Ry. v. Forwood</i> , [1901] 1 Ch. 746; 70 L. J. Ch. 385; 84 L. T. 279; 49 W. R. 337; 8 Manson, 374	95
<i>Cothay v. Fennell</i> (1830), 8 L. J. (o.s.) K. B. 302; 10 B. & C. 671; 34 R. R. 541....	186
<i>Cotter v. Bank of England</i> (1833), 3 M. & S. 180; 2 Dowl. 728; 2 L. J. C. P. 158.....	164
<i>Cotter v. Nat. Prov. Bank</i> (1904), 20 T. L. R. 607	176
<i>Cottle v. Aldrich</i> (1815), 4 M. & S. 175; 1 Stark. 37; 16 R. R. 433.....	279
<i>Cotton, Re</i> (1913), 57 S. J. 174	228
<i>Coulthurst v. Sweet</i> (1866), L. R. 1 C. P. 649	187
<i>County Life Ass. Co., Re</i> (1870), L. R. 5 Ch. 288; 39 L. J. Ch. 471; 22 L. T. 537; 18 W. R. 390	18, 171
<i>Coupé v. Collyer</i> (1890), 62 L. T. 927.....	47, 206
<i>Coupé Co. v. Maddick</i> , [1891] 2 Q. B. 413; 60 L. J. Q. B. 676; 65 L. T. 489.....	211
<i>Court v. Berlin</i> , [1897] 2 Q. B. 396; 66 L. J. Q. B. 714; 77 L. T. 293; 46 W. R. 55... ..	139
<i>Courtauld v. Saunders</i> (1867), 16 L. T. 562; 15 W. R. 906	242
<i>Cousin's Trusts, Re</i> (1886), 31 Ch. D. 671; 55 L. J. Ch. 662; 54 L. T. 376; 34 W. R. 393	226
<i>Couston, Re</i> (1873), L. R. 8 Ch. 144; 42 L. J. Bk. 17	228
<i>Coutts v. Irish Exhibition</i> (1891), 7 T. L. R. 313.....	249
<i>Couturier v. Hastie</i> (1852), 8 Ex. 40; 22 L. J. Ex. 97; 96 R. R. 584	3
<i>Cowdry v. Day</i> (1859), 1 Giff. 316; 29 L. J. Ch. 39; 114 R. R. 464	89
<i>Cowell v. Betteley</i> (1834), 3 L. J. C. P. 148; 4 M. & Scott, 265; 10 Bing. 432; 2 D. P. C. 480	154
— <i>v. Simpson</i> (1809), 16 Ves. 275; 10 R. R. 181	146, 181
<i>Cowie v. Remfry</i> (1846), 5 Moo. P. C. 232; 70 R. R. 47.....	191
— <i>v. Witt</i> (1874), 23 W. R. 76	246

	PAGE
Cowley v. Sunderland Corpn. (1861), 6 H. & N. 565; 30 L. J. Ex. 127; 4 L. T. 120; 9 W. R. 648; 123 R. R. 690	214
Cowper v. Stoneham (1893), 68 L. T. 18	272
Cox, <i>Ex p.</i> (1897), 75 L. T. 669	277
— v. Bruce (1886), 18 Q. B. D. 147; 56 L. J. Q. B. 121; 57 L. T. 128; 35 W. R. 207	68
— v. Hickman (1861), 9 H. L. Cas. 268; 9 C. B. 47; 30 L. J. C. P. 125; 8 W. R. 754	13
— v. Leech (1857), 1 C. B. (N.S.) 617; 26 L. J. C. P. 125; 107 R. R. 827	135
— v. Midland Ry. (1849), 3 Ex. 268; 18 L. J. Ex. 65; 13 Jur. 65; 77 R. R. 623	53, 54
— v. Prentice (1815), 3 M. & S. 344; 16 R. R. 288	257
Craddock v. Rogers (1884), 53 L. J. Ch. 968; 51 L. T. 191; 1 T. L. R. 556	89
Craig v. Watson (1845), 8 Beav. 427; 68 R. R. 138	109
Cramb v. Goodwin (1919), 35 T. L. R. 477	124
Cranch v. White (1835), 1 Scott, 314; 1 Bing. N. C. 414; 1 Hodges, 61; 4 L. J. C. P. 113; 3 Dowl. P. C. 377; 6 C. & P. 767; 41 R. R. 616	268
Crantz v. Gill (1796), 2 Esp. 471; 5 R. R. 746	29
Craven-Ellis v. Canons, Ltd., [1936] 2 K. B. 403; 105 L. J. K. B. 767; 155 L. T. 376; 80 S. J. 652; 52 T. L. R. 657; [1936] 2 All E. R. 1066	120
Crawshaw v. Homfray (1820), 4 B. & A. 50; 22 R. R. 618	146
— v. Thornton (1836), 2 Myl. & C. 1; 4 L. J. Ch. 177	164
Crédit Foncier, <i>Ex p.</i> (1872), L. R. 7 Ch. 161; 41 L. J. Ch. 345; 25 L. T. 858; 20 W. R. 254	222
Cripps, <i>Ex p.</i> , [1899] 1 Q. B. 863; 68 L. J. Q. B. 597; 80 L. T. 495; 47 W. R. 524; 6 Manson, 185	152
Crocker, <i>Re</i> , [1936] Ch. 696; 105 L. J. Ch. 276; 155 L. T. 344; [1936] 2 All E. R. 899	99
Croft v. Alison (1821), 4 B. & A. 590; 23 R. R. 407	210
Cropper v. Cook (1868), L. R. 3 C. P. 194; 16 W. R. 596	59, 137
Cross v. Cross (1881), 43 L. T. 533	151
— v. Matthews (1904), 91 L. T. 500; 20 T. L. R. 603	195, 196
— v. Williams (1862), 31 L. J. Ex. 145; 6 L. T. 675; 10 W. R. 302	249
Crossfield v. Kyle Shipping Co., [1916] 2 K. B. 885; 85 L. J. K. B. 1310; 115 L. T. 285	68, 219
Croskey v. Mills (1834), 1 C. M. & R. 298; 3 L. J. Ex. 297	99
Crossley v. Magniac, [1893] 1 Ch. 594; 67 L. T. 798; 9 T. L. R. 126; 41 W. R. 598	204
Crowe v. Ballard (1790), 2 Cox, 253; 1 Ves. jun. 215; 3 Bro. C. C. 117; 1 R. R. 122	89
Crowfoot v. Gurney (1832), 9 Bing. 372; 2 M. & Scott 473; 2 L. J. C. P. 21; 35 R. R. 557	259, 278
Crowley's Claim (1870), L. R. 18 Eq. 182; 43 L. J. Ch. 551; 30 L. T. 484; 22 W. R. 586	136, 140
Crowther v. Elgood (1887), 34 Ch. D. 691; 56 L. J. Ch. 416; 56 L. T. 415; 35 W. R. 369; 3 T. L. R. 355	99, 116
Crumplin v. L. J. S. Bank (1913), 109 L. T. 856; 30 T. L. R. 99; 19 Com. Cas. 69	272
Crusader, <i>The</i> , [1907] P. 196; 76 L. J. P. 102; 97 L. T. 20; 23 T. L. R. 382	66
Cruse v. Paine (1869), L. R. 4 Ch. 441; 38 L. J. Ch. 225; 17 W. R. 1033	193
Cullen, <i>Re</i> (1859), 27 Beav. 51; 122 R. R. 310	152
— v. Queensbury (1781), 1 Bro. P. C. 396	237
— v. Thomson (1862), 4 Macq. H. L. 424; 6 L. T. 870; 9 Jur. 85; 134 R. R. 73	267
Cullerne v. L. & S. Building Soc. (1890), 25 Q. B. D. 485; 59 L. J. Q. B. 525; 63 L. T. 511; 63 L. T. 511; 39 W. R. 88; 6 T. L. R. 449	104, 116
Cullum v. Hodges (1901), 18 T. L. R. 6	141
Cunliffe v. Blackburn Building Soc. (1884), 9 A. C. 857; 54 L. J. Ch. 376; 52 L. T. 225; 33 W. R. 309	157
Cunningham, <i>Re</i> (1887), 36 Ch. D. 532; 57 L. J. Ch. 169; 58 L. T. 16	173
— v. Collier (1785), 4 Doug. 233	234
Curlewis v. Birkbeck (1863), 3 F. & F. 894; 130 R. R. 905	167, 201, 284
Curling v. Shuttleworth (1829), 8 L. J. (o.s.) C. P. 113; 6 Bing. 121, 134; 3 M. & P. 368	257

	PAGE
Curnock v. Born. <i>See Re Born.</i>	
Currie v. Booth (1902), 7 Com. Cas. 77	193
Curtice v. London, City and Midland Bank, [1908] 1 K. B. 293; 77 L. J. K. B. 341; 98 L. T. 190; 24 T. L. R. 176	145
Curtis v. Barclay (1826), 4 L. J. (o.s.) K. B. 82; 7 D. & R. 539; 5 B. & C. 141...52, 137	
— v. Nixon (1871), 24 L. T. 706	121
— v. Williamson (1874), L. R. 10 Q. B. 57; 44 L. J. Q. B. 27; 31 L. T. 678; 23 W. R. 236	197
Curwen v. Milburn (1889), 42 Ch. D. 424; 62 L. T. 278; 38 W. R. 49	162
Cuthbert v. Robarts, [1909] 2 Ch. 226; 78 L. J. Ch. 529; 100 L. T. 796; 25 T. L. R. 583	159
Cutter v. Powell (1795), 6 T. R. 320; 3 R. R. 185	120
 DADSWELL v. Jacobs (1887), 34 Ch. D. 278; 56 L. J. Ch. 233; 55 L. T. 857; 35 W. R. 261	76
Daily Telegraph Newspaper Co. v. M'Laughlin, [1904] A. C. 776; 91 L. T. 233; 20 T. L. R. 674	4, 279
Dalby v. Pullen (1830), 1 Russ. & M. 296; 3 Sim. 29; 30 R. R. 123	14
Dale and Plant, <i>Re</i> (1889), 61 L. T. 206; 5 T. L. R. 585; 6 T. L. R. 123	35, 36, 130
Dale v. Humfrey (1858), E. B. & E. 1004; 27 L. J. Q. B. 390; 113 R. R. 964	247
— v. Sollet (1767), 4 Burr. 2133	80
Dallow v. Garrod (1884), 14 Q. B. D. 543; 54 L. J. Q. B. 76; 52 L. T. 240; 1 T. L. R. 114	153
Dally v. Wonham (1863), 33 Beav. 154; 32 L. J. Ch. 790; 8 Jur. 980; 9 L. T. 75; 11 W. R. 1090; 140 R. R. 64	88
Dalton v. Angus (1881), 6 App. Cas. 740; 50 L. J. Q. B. 689	2
— v. Irwin (1830), 4 C. & P. 289	134
Danby v. Coutts (1885), 29 Ch. D. 500; 54 L. J. Ch. 577; 52 L. T. 401; 1 T. L. R. 313	49
Daniel v. Adams (1764), Ambl. 495	62
— v. Rickett, [1938] W. N. 190; [1938] 2 All E. R. 631	208
Daniell, <i>Ex p.</i> , [1900] 2 Q. B. 489; 69 L. J. Q. B. 725; 82 L. T. 776; 48 W. R. 678; 7 Manson, 302	152
Daniels v. Trefusis, [1914] 1 Ch. 788; 83 L. J. Ch. 579; 109 L. T. 744	30
Dantra v. Stiebel (1863), 3 F. & F. 951; 130 R. R. 941	111
D'Arcy v. Tamar Ry. (1866), L. R. 2 Ex. 158; 36 L. J. Ex. 37; 4 H. & C. 463; 12 Jur. 548; 14 L. J. 626; 14 W. R. 968; 143 R. R. 725	9
Daring, <i>The</i> (1868), L. R. 2 Ad. 260; 37 L. J. Ad. 29	156
Dartnall v. Howard (1825), 3 L. J. (o.s.) K. B. 246; 4 B. & C. 345; 6 D. & R. 438; Ry. & M. 169	108
Daubigny v. Duval (1794), 5 T. R. 604	184
Daun v. Simmins (1879), 41 L. T. 783; 28 W. R. 129; 44 J. P. 264	56, 173
Davidson v. Stanley (1841), 2 M. & G. 721; 3 Scott, N. R. 49; 58 R. R. 556	54
— v. Wood (1863), 1 D. J. & S. 465; 32 L. J. Ch. 400; 8 L. T. 476; 11 W. R. 791... 20	
Davies, <i>Ex p.</i> (1881), 19 Ch. D. 86; 45 L. T. 632; 30 W. R. 237	83, 164
— v. Clough (1836), 8 Sim. 262; 6 L. J. Ch. 113; 42 R. R. 171	100
— v. Jenkins (1843), 1 L. & L. 321; 11 M. & W. 745; 12 L. J. Ex. 386; 63 R. R. 744	269
— v. Lowndes (1847), 3 C. B. 823; 71 R. R. 497	152
— v. Wilkinson (1828), 6 L. J. (o.s.) C. P. 121; 1 M. & P. 502; 4 Bing. 573; 29 R. R. 634	138
Davis v. Artingstall (1880), 49 L. J. Ch. 609; 42 L. T. 507; 29 W. R. 137	272
— v. Bowsher (1794), 5 T. R. 488; 2 R. R. 650	150
— v. Carter (1887), 3 T. L. R. 88	267
— v. Clarke (1844), 6 Q. B. 16; 13 L. J. Q. B. 305; 66 R. R. 255	190
— v. Howard (1890), 24 Q. B. D. 691; 59 L. J. Q. B. 133	140

	PAGE
<i>Davis v. Trollope & Sons</i> , [1943] 1 All E. R. 501.....	128
<i>Davison v. Donaldson</i> (1882), 9 Q. B. D. 623; 47 L. T. 564; 31 W. R. 277	197, 199
— <i>v. Fernandes</i> (1890), 6 T. L. R. 73.....	141
<i>Davy v. Waller</i> (1899), 81 L. T. 107	168
<i>Davys v. Richardson</i> (1888), 21 Q. B. D. 202; 57 L. J. Q. B. 409; 59 L. T. 765; 36 W. R. 728	256
<i>Dawson v. G. C. Ry.</i> (1919), 88 L. J. K. B. 1177; 121 L. T. 263; 12 B. W. C. C. 163...	221
— <i>v. Isle</i> , [1906] 1 Ch. 633; 75 L. J. Ch. 338; 54 W. R. 452; 95 L. T. 385	229
<i>Deakin, Re</i> , [1900] 2 Q. B. 489; 69 L. J. Q. B. 725; 82 L. T. 776; 48 W. R. 678; 7 <i>Manson</i> 302	152
<i>Dean and Gilbert's Claim</i> (1872), 41 L. J. Ch. 476; 26 L. T. 467	129
<i>Deare v. Soutten</i> (1869), L. R. 9 Eq. 151; 21 L. T. 523; 18 W. R. 203	25
<i>Debenham v. Mellon</i> (1880), 6 App. Cas. 24; 50 L. J. Q. B. 155; 43 L. T. 673; 29 W. R. 141.....	20, 21, 22
<i>Debenhams v. Perkins</i> (1925), 133 L. T. 252	196
<i>De Bouchout v. Goldsmid</i> (1800), 5 Ves. 211	50
<i>Debtor, Re A</i> , [1914] 2 K. B. 758; 83 L. J. K. B. 1176; 110 L. T. 944	63, 64
—, [1927] 2 Ch. 367; 96 L. J. Ch. 381; 137 L. T. 507	232
—, [1937] Ch. 92; 106 L. J. Ch. 193; [1936-7] B. & C. R. 192; 156 L. T. 235.....	281
<i>De Bussche v. Alt</i> (1877), 8 Ch. D. 286; 47 L. J. Ch. 381; 38 L. T. 370	39, 69, 72, 86, 89, 93
<i>De Comas v. Prost</i> (1865), 3 Moo. P. C. 158; 12 L. T. 682; 13 W. R. 595	277
<i>Dee Estates, Re</i> , [1911] 2 Ch. 85; 80 L. J. Ch. 461; 104 L. T. 903	157
<i>Deep Sea Fishery Co.'s Claim</i> , [1902] 1 Ch. 507; 71 L. J. Ch. 321; 86 L. T. 193; 9 <i>Manson</i> 205.....	225
<i>De Gorter v. Attenborough</i> (1905), 21 T. L. R. 19	183
<i>De la Chaumette v. Bank of England</i> (1829), 7 L. J. (o.s.) K. B. 179; 9 B. & C. 208; Dan. & L. 318; 32 R. R. 643.....	159
<i>De Mattos v. Benjamin</i> (1894), 63 L. J. Q. B. 248; 70 L. T. 560; 10 T. L. R. 221...	81
<i>Demerara Bauxite Co. v. Hubbard</i> , [1923] A. C. 673; 92 L. J. P. C. 148	87
<i>De Montmorency v. Devereux</i> (1840), 7 C. & F. 188	87
<i>Denew v. Deverell</i> (1813), 3 Camp. 451	134
<i>Denham, Re</i> (1883), 25 Ch. D. 752; 50 L. T. 523; 32 W. R. 487	273
<i>Dennison v. Jeffs</i> , [1896] 1 Ch. 611; 65 L. J. Ch. 435; 74 L. T. 270; 44 W. R. 476...8, 30	
<i>Dennys v. Sargeant</i> (1834), 6 C. & P. 419	23
<i>Dent v. Dunn</i> (1812), 3 Camp. 296; 13 R. R. 809	198
<i>Dermatine Co. v. Ashworth</i> (1905), 21 T. L. R. 510	236, 242
<i>De Roufigny v. Peale</i> (1811), 3 Taunt. 484; 12 R. R. 687	108
<i>Deslandes v. Gregory</i> (1860), 30 L. J. Q. B. 36; 8 W. R. 585	245
<i>Devala Provident, etc., Co., Re</i> (1883), 22 Ch. D. 593; 52 L. J. Ch. 434; 48 L. T. 259; 31 W. R. 425.....	221
<i>Deverell v. Bolton</i> (1812), 18 Ves. 509	30
<i>Dew v. Met. Ry.</i> (1885), 1 T. L. R. 358	69
<i>Dey v. Pullinger, etc., Co.</i> , [1921] 1 K. B. 77; 89 L. J. K. B. 1229; 39 T. L. R. 10...	171
<i>Deyes v. Wood</i> , [1911] 1 K. B. 806; 80 L. J. K. B. 553; 104 L. T. 404	12
<i>Dibbins v. Dibbins</i> , [1896] 2 Ch. 348; 65 L. J. Ch. 724; 75 L. T. 137; 44 W. R. 595...	38
<i>Dicas v. Stockley</i> (1836), 7 C. & P. 587; 48 R. R. 825	161
<i>Dickenson v. Fletcher</i> (1873), L. R. 9 C. P. 1; 43 L. J. M. C. 25; 29 L. T. 540.....	286
— <i>v. Naul</i> (1833), 4 B. & Ad. 638; 1 N. & M. 721	261, 264
<i>Dickinson v. Lilwall</i> (1815), 4 Camp. 279; 1 Stark. 128	275
— <i>v. Marrow</i> (1845), 14 M. & W. 713	278
— <i>v. Valpy</i> (1829), 8 L. J. (o.s.) K. B. 51; 5 M. & R. 126; 10 B. & C. 128; L. & W. 6; 34 R. R. 348	55
<i>Dickson v. Devitt</i> (1916), 86 L. J. K. B. 316; 82 T. L. R. 547	106
— <i>v. Murray</i> (1887), 57 L. T. 223	228

	PAGE
<i>Didcott v. Friesner</i> (1896), 11 T. L. R. 187	126
<i>Dietrichsen v. Cabburn</i> (1846), 2 Phill. 52; 10 Jur. 60; 78 R. R. 17	19
<i>Digby, Ex p.</i> (1884), 53 L. J. Ch. 972; 51 L. T. 72	154
<i>Diggle v. Higgs</i> (1877), 2 Ex. D. 422; 46 L. J. Ex. 721; 37 L. T. 27	284
<i>Dingle v. Hare</i> (1859), 7 C. B. 145; 29 L. J. C. P. 143; 1 L. T. 38; 6 Jur. 679; 121 R. R. 424	51, 58, 60
<i>Dimwiddie v. Bailey</i> (1801), 6 Ves. 136	165
<i>Director of Public Prosecutions v. Kent and Sussex Contractors, Ltd.</i> , [1944] 1 K. B. 146; 113 L. J. K. B. 88; 170 L. T. 41; 60 T. L. R. 175; [1944] 1 All E. R. 119	288, 289
<i>Dixon, Ex p.</i> (1876), 4 Ch. D. 133; 46 L. J. Bk. 20; 25 W. R. 105; 35 L. T. 644	60, 167, 201, 202
— <i>v. Broomfield</i> (1814), 2 Chit. 205	14
— <i>v. Ewart</i> (1817), Buck, 94; 3 Mer. 322	282
— <i>v. Hamond</i> (1819), 2 R. & A. 310	80
— <i>v. Hurrell</i> (1838), 8 C. & P. 717	24
— <i>v. Kennaway</i> , [1900] 1 Ch. 833; 69 L. J. Ch. 501; 82 L. T. 527; 7 Manson, 446	173
— <i>v. Stansfeld</i> (1850), 10 C. B. 398; 84 R. R. 631	149
— <i>v. Winch</i> , [1900] 1 Ch. 736; 69 L. J. Ch. 465; 82 L. T. 437; 48 W. R. 612	224, 225
<i>Djambi (Sumatra) Rubber Estates, Re</i> (1912), 107 L. T. 631; 29 T. L. R. 28	219, 221
<i>Dodds, Re</i> (1891), 60 L. J. Q. B. 599; 64 L. T. 476; 7 T. L. R. 259	230
<i>Doe d. Lyster v. Goldwin</i> (1841), 1 G. & D. 463; 2 Q. B. 143; 57 R. R. 621; 10 L. J. Q. B. 275	38
— <i>d. Mann v. Walters</i> (1830), 10 B. & C. 626; 5 M. & R. 357; 34 R. R. 522; 8 L. J. (o.s.) K. B. 297	38
— <i>d. Rhodes v. Robinson</i> (1837), 3 Bing. N. C. 677; 4 Scott, 396; 3 Hodges, 84; 6 L. J. C. P. 235; 43 R. R. 758	70, 71
<i>Doey v. L. & N. W. Ry.</i> , [1919] 1 K. B. 623; 88 L. J. K. B. 737; 120 L. T. 612; 35 T. L. R. 290	183
<i>Donaldson v. Haldane</i> (1840), 7 C. & F. 762; 51 R. R. 79	108, 109
<i>Donelly v. Popham</i> (1807), 1 Taunt. 1; 9 R. R. 687	45
<i>Donovan v. Laing, Wharton and Down Construction Syndicate, Ltd.</i> , [1893] 1 Q. B. 629; 63 L. J. Q. B. 25; 68 L. T. 512; 9 T. L. R. 313; 41 W. R. 455	213
<i>Dooby v. Watson</i> (1888), 39 Ch. D. 178; 57 L. J. Ch. 865; 58 L. T. 943; 4 T. L. R. 584	108
<i>Doorman v. Jenkins</i> (1834), 2 A. & E. 256; 4 N. & M. 170; 4 L. J. K. B. 29; 44 R. R. 429	107
<i>Dougal v. Kemble</i> (1826), 4 L. J. (o.s.) C. P. 103; 3 Bing. 383; 11 Moo. 250; 28 R. R. 648	237
<i>Douglas, Re</i> , [1898] 1 Ch. 199; 67 L. J. Ch. 85; 77 L. T. 552; 46 W. R. 421	163
— <i>Re, ex p. Snowball</i> (1872), L. R. 7 Ch. 534; 41 L. J. Bk. 49; 26 L. T. 894; 20 W. R. 786	280, 282
— <i>v. Ewing</i> (1857), 6 Ir. C. L. R. 395	180
<i>Dover Coalfield Extension Co., Re</i> , [1908] 1 Ch. 65; 77 L. J. Ch. 94; 98 L. T. 31; 24 T. L. R. 52	95
<i>Dovey v. Cory</i> , [1901] A. C. 477; 70 L. J. Ch. 753; 85 L. T. 257; 50 W. R. 65; 8 Manson, 346	105, 107, 268
<i>Downard v. Williams</i> (1890), 6 T. L. R. 316	283
<i>Downman v. Williams (or Jones)</i> (1845), 7 Q. B. 103; 14 L. J. Q. B. 228; 68 R. R. 413	244
<i>Dowson and Jenkins' Contract, Re</i> , [1904] 2 Ch. 219; 73 L. J. Ch. 684; 91 L. T. 121	50
<i>Drabble Bros., Re</i> , [1930] 2 Ch. 211; 99 L. J. Ch. 345; 143 L. T. 337	212
<i>Drakeford v. Piercy</i> (1866), 7 B. & S. 515; 14 L. T. 403; 147 R. R. 426	202
<i>Dramburg v. Pollitzer</i> (1872), 28 L. T. 470; 21 W. R. 682	188, 236
<i>Draper v. Manvers</i> (1892), 9 T. L. R. 73	19
<i>Dresser v. Norwood</i> (1864), 17 C. B. 466; 34 L. J. C. P. 48; 12 W. R. 1030; 10 Jur. 851; 11 L. T. 111; 142 R. R. 455	203, 223

	PAGE
Drew v. Nunn (1879), 4 Q. B. D. 661; 48 L. J. Q. B. 591; 40 L. T. 671; 27 W. R. 810.....	4, 279, 285
Drinkwater v. Goodwin (1775), Cowp. 251	60, 148, 204, 264, 278
Druce v. Levy (1891), 7 T. L. R. 259	140
Drughorn v. Rederi A/B Transatlantic, [1919] A. C. 203; 88 L. J. K. B. 233; 120 L. T. 70; 35 T. L. R. 73	188
Dryden v. Frost (1837), 3 Myl. & C. 670; 8 L. J. Ch. 235; 2 Jur. 1030; 45 R. R. 344... ..	225
Ducarrey v. Gill (1830), M. & M. 450; 4 C. & P. 121	190
Duck v. Tower, etc. Co., [1901] 2 K. B. 314; 70 L. J. K. B. 625; 84 L. T. 847	171
Dudley, <i>Re</i> (1883), 12 Q. B. D. 44; 53 L. J. Q. B. 16; 49 L. T. 737; 32 W. R. 264... ..	116
Dufresne v. Hutchinson (1810), 3 Taunt. 117	105
Dumas, <i>Ex p.</i> (1754), 1 Atk. 231	229
Duncan v. Beeson. <i>See</i> Duncan v. Hill.	
— v. Benson (1848), 1 Ex. 537; 17 L. J. Ex. 238; 74 R. R. 754; affirmed 3 Ex. 644; 18 L. J. Ex. 169; 77 R. R. 776.....	67
— v. Blundell (1820), 3 Stark. 6	132
— v. Hill (1873), L. R. 8 Ex. 242; 42 L. J. Ex. 179; 29 L. T. 268; 21 W. R. 797... ..	145
— v. Skipwith (1809), 2 Camp. 68	107
Dunlop v. De Murrieta (1886), 3 T. L. R. 166	72, 202
Dunlop Rubber Co. v. Haigh & Son, [1937] 1 K. B. 347; 106 L. J. K. B. 166; 155 L. T. 579; (1936-7) B. & C. R. 149; 80 S. J. 933; 53 T. L. R. 99; [1936] 3 All E. R. 381	171
Dunmore, <i>The</i> (1875), 32 L. T. 340	133
Dunn, <i>Re</i> . <i>See</i> Simmons v. Liberal Opinion, Ltd.	
— v. Macdonald, [1897] 1 Q. B. 555; 66 L. J. Q. B. 420; 76 L. T. 444; 45 W. R. 355; 13 T. L. R. 292.....	234, 249
— v. Newton (1884), 1 C. & E. 278	195
— v. Ocean Accident, etc. (1933), 50 T. L. R. 32; 47 Ll. L. Rep. 129	225
Dunne v. English (1874), L. R. 18 Eq. 524; 31 L. T. 75	86
Durnford v. Baker, [1924] 2 K. B. 587; 93 L. J. K. B. 866; 132 L. T. 35; 40 T. L. R. 757.....	27
Durrant, <i>Ex p.</i> (1888), 5 M. B. R. 37	122
Durrell v. Evans (1862), 1 H. & C. 174; 31 L. J. Ex. 337; 7 L. T. 97; 10 W. R. 665; 9 Jur. 104; 130 R. R. 446	5, 14, 51
Dutton v. Marsh (1871), L. R. 6 Q. B. 361; 40 L. J. Q. B. 175; 24 L. T. 470; 19 W. R. 754	242, 243
Dyas v. Cruise (1845), 8 Ir. Eq. 407; 2 J. & L. 460; 69 R. R. 348.....	74, 167
Dyer v. Munday, [1895] 1 Q. B. 742; 64 L. J. Q. B. 448; 72 L. T. 448; 43 W. R. 440; 11 T. L. R. 282	216
— v. Pearson (1824), 4 D. & R. 648; 3 B. & C. 38; 27 R. R. 286	16
Dyster, <i>Ex p.</i> (1816), 2 Rose, 349.....	98, 166
— v. Randall, [1926] Ch. 932; 95 L. J. Ch. 504; 70 S. J. 797; B. & C. R. 113	200
Dyte v. St. Pancras (1872), 27 L. T. 342	32
EAGLESFIELD v. Londonderry (1876), 38 L. T. 303; 26 W. R. 540; affirming 4 Ch. D. 693	252, 267
Eames v. Hacon (1881), 18 Ch. D. 347; 50 L. J. Ch. 740; 45 L. T. 196; 29 W. R. 877	80
East India Co. v. Henchman (1791), 1 Ves. jun. 289	74, 84, 112
— v. Tritton (1824), 3 L. J. (o.s.) K. B. 24; 5 D. & R. 214; 3 B. & C. 280; 27 R. R. 353.....	257
East London Harbour Board v. Caledonian Shipping Co., [1908] A. C. 271; 98 L. T. 682; 77 L. J. P. C. 111	208
Easterbrook v. Barker (1870), L. R. 6 C. P. 1; 40 L. J. C. P. 17; 23 L. T. 535; 19 W. R. 208	12
Eastern Counties Ry. v. Broom (1851), 6 Ex. 314; 20 L. J. Ex. 196; 86 R. R. 310; 15 Jur. 297	34, 43

	PAGE
Eastland v. Burchell (1878), 3 Q. B. D. 432; 47 L. J. Q. B. 500; 38 L. T. 563; 27 W. R. 290	23
Eccossaise Steamship Co. v. Lloyd (1890), 7 T. L. R. 76	116
Economic Fire Office, <i>Re</i> (1896), 12 T. L. R. 142	170
Edelstein v. Schuler, [1902] 2 K. B. 144; 71 L. J. K. B. 572; 87 L. T. 204; 50 W. R. 493; 7 Com. Cas. 172	178
Eden v. Ridsdale's Lamp Co. (1889), 58 L. J. Q. B. 579; 61 L. T. 444	113
Edgar v. Fowler (1803), 3 East, 222; 7 R. R. 433	284
Edgell v. Day (1865), L. R. 1 C. P. 80; 35 L. J. C. P. 7; 13 L. T. 328; H. & R. 8; 14 W. R. 87; 148 R. R. 619	77, 101, 116
Edison, The, [1933] A. C. 449; 102 L. J. P. 73; 38 Com. Cas. 267; 149 L. T. 49; 77 S. J. 176; 49 T. L. R. 289; 45 Ll. L. Rep. 123; 18 Asp. M. C. 380	109
Edmunds v. Bushell (1865), L. R. 1 Q. B. 97; 35 L. J. Q. B. 20; 12 Jur. 332; 148 R. R. 603	54, 169
Edward Oliver, The (1867), L. R. 1 Ad. 379; 36 L. J. Ad. 13; 16 L. T. 575	156
Edward's Will Trusts, <i>Re</i> , [1937] Ch. 553; 106 L. J. Ch. 347; 156 L. T. 527; 81 S. J. 377; 53 T. L. R. 699; 3 All E. R. 58	221
Edwards, <i>Ex p.</i> (1842), 2 M. D. & De G. 625	229
—, <i>Ex p.</i> , <i>re</i> Chapman (1884), 13 Q. B. D. 747; 51 L. T. 881; 33 W. R. 268	256
—, <i>Ex p.</i> , <i>re</i> Johnson (1881), 8 Q. B. D. 262; 51 L. J. Q. B. 108; 45 L. T. 578	73, 161
— v. Havill (1853), 14 C. B. 107; 2 C. L. R. 1343; 23 L. J. C. P. 8; 98 R. R. 561	66
— v. Hodding (1814), 5 Taunt. 815; 15 R. R. 662	257
— v. Hope (1885), 14 Q. B. D. 922; 54 L. J. Q. B. 379; 53 L. T. 69; 33 W. R. 672	154
— v. L. & N. W. Ry. (1870), L. R. 5 C. P. 445; 39 L. J. C. P. 241; 22 L. T. 656; 18 W. R. 834	39, 55, 56, 211
— v. Meyrick (1842), 2 Hare, 60; 62 R. R. 23	88
— v. Towels (1843), 6 Scott, N. R. 641; 5 M. & G. 624; 12 L. J. C. P. 239	22
Edye, <i>Re</i> (1891), 63 L. T. 762; 39 W. R. 198; 7 T. L. R. 183	116
Egginton v. Lichfield (1855), 5 E. & B. 100; 24 L. J. Q. B. 360; 103 R. R. 387	269
— v. Reader (1936), 52 T. L. R. 212; [1936] 1 All E. R. 7	207
Eichengruen v. Mond, [1940] Ch. 785; 163 L. T. 219; 56 T. L. R. 845; [1940] 3 All E. R. 148	275
Elbinger, etc. v. Clays (1873), L. R. 8 Q. B. 313; 42 L. J. Q. B. 151; 28 L. T. 405	188, 236
Elgood v. Harris, [1896] 2 Q. B. 491; 66 L. J. Q. B. 53; 75 L. T. 419; 45 W. R. 158; 12 T. L. R. 504	138
Elin, The (1883), 8 P. D. 129; 52 L. J. Ad. 55; 49 L. T. 87; 31 W. R. 736	156
Eliza Cornish, The (1853), 1 Spinks, 36; 17 Jur. 738	67
Elkington v. Hurter, [1892] 2 Ch. 452; 61 L. J. Ch. 514; 66 L. T. 764	250
Ellender v. Wood (1888), 4 T. L. R. 680	62
Elliot v. Ince (1857), 7 De G. M. & G. 475; 109 R. R. 208	4
Elliott v. Bax-Ironside, [1925] 2 K. B. 301; 94 L. J. K. B. 807; 133 L. T. 624; 41 T. L. R. 631	242
— v. Turquand (1881), 7 A. C. 79; 51 L. J. P. C. 1; 45 L. T. 771; 30 W. R. 477	282
Ellis, <i>Re</i> , [1908] W. N. 215; 25 T. L. R. 38	76
— v. Goulton, [1893] 1 Q. B. 350; 62 L. J. Q. B. 232; 9 T. L. R. 223	257
— v. National Free Labour Assn. (1905), 7 F. 629	217
— v. Pond, [1898] 1 Q. B. 426; 67 L. J. Q. B. 345; 78 L. T. 125	145
— v. Thompson (1838), 3 M. & W. 445; 1 H. & H. 131; 7 L. J. Ex. 185; 49 R. R. 679	219
— v. Turner (1800), 8 T. R. 531; 5 R. R. 441	210
Ellis & Co.'s Trustee v. Watsam (1923), 155 L. T. Jo. 363	85
Elliston's Case, [1897] 1 Ch. 575; 66 L. J. Ch. 297; 76 L. T. 300	277
Ellmville, The, [1904] P. 319; 73 L. J. P. 104; 91 L. T. 151; 9 Asp. M. C. 606	242
Elsee v. Gatward (1793), 5 T. R. 143	74, 107

	PAGE
<i>Ely, Re</i> (1900), 48 W. R. 693; 82 L. T. 501.....	268
<i>Emery v. Nolloth</i> , [1903] 2 K. B. 264; 72 L. J. K. B. 620; 89 L. T. 100; 52 W. R. 107; 67 J. P. 354; 20 Cox, C. C. 507.....	286
<i>Emden v. Carte</i> (1881), 19 Ch. D. 311; 51 L. J. Ch. 371; 45 L. T. 328; 30 W. R. 17 ...	153
<i>Emerson v. Blonden</i> (1794), 1 Esp. 142; 5 R. R. 725	220
<i>Emery v. Emery</i> (1827), 1 Y. & J. 501; 30 R. R. 834	27
<i>Emma Silver Mining Co. v. Grant</i> (1877), 11 Ch. D. 918; 40 L. T. 804	95
— <i>v. Lewis</i> (1879), 4 C. P. D. 396; 48 L. J. C. P. 257; 40 L. T. 168; 27 W. R. 836	95
<i>Emmens v. Elderton</i> (1852), 4 H. L. C. 624; 13 C. B. 495; 94 R. R. 288; 18 Jur. 21....	128
<i>Emmerson v. Heelis</i> (1809), 2 Taunt. 38; 11 R. R. 520	5, 13, 62
<i>Emmett v. Norton</i> (1838), 8 C. & P. 506; 56 R. R. 848	22, 24, 27
<i>Empress Ass. Corpn. v. Bowring</i> (1906), 11 Com. Cas. 107	5
<i>Empress Engineering Co., Re</i> (1880), 16 Ch. D. 125; 43 L. T. 742.....	35
<i>Engelhart v. Farrant</i> , [1897] 1 Q. B. 240; 66 L. J. Q. B. 122; 75 L. T. 617; 45 W. R. 179; 13 T. L. R. 81	209
<i>English and Colonial Produce Co., Re</i> , [1906] 2 Ch. 435; 22 T. L. R. 669; 75 L. J. Ch. 831	35
<i>English and Scottish Marine Ins. Co., Re</i> (1870), L. R. 5 Ch. 737; 39 L. J. Ch. 685; 23 L. T. 685	130
<i>Entick v. Carrington</i> (1765), 19 St. Tr. 1030	267
<i>Entwistle v. Dent</i> (1848), 1 Ex. 812; 18 L. J. Ex. 138	51
<i>Erlanger v. New Sombrero, etc. Co.</i> (1878), 3 A. C. 1218; 48 L. J. Ch. 73; 39 L. T. 269; 27 W. R. 65	95
<i>Erskine v. Sachs</i> , [1901] 2 K. B. 504; 70 L. J. K. B. 978; 85 L. T. 385	95, 141
<i>Eadaile v. La Nauze</i> (1835), 1 Y. & C. 394; 4 L. J. Ex. Eq. 46; 41 R. R. 299 ...	50, 176
<i>Espin v. Pemberton</i> (1859), 3 De G. & J. 547; 28 L. J. Ch. 311; 5 Jur. 157; 7 W. R. 221; 121 R. R. 224	225
<i>Essery v. Cobb</i> (1832), 5 C. & P. 358	239
<i>Etna Ins. Co., Re</i> (1873), 7 Ir. R. Eq. 235, 424	132
<i>Europa, The</i> (1863), 2 Moo. P. C. 1; 32 L. J. Ad. 188; 8 L. T. 368; Br. & Lush. 89; 9 Jur. 690; 141 R. R. 1.....	155
<i>European Bank, Re</i> (1872), L. R. 8 Ch. 41; 27 L. T. 732; 21 W. R. 45	160
— (1870), L. R. 5 Ch. 358; 39 L. J. Ch. 588	227
<i>Eva, The</i> , [1921] P. 454; 37 T. L. R. 920	156
<i>Evans v. Collins</i> (1844), 12 L. J. Q. B. 339; 5 Q. B. 804; D. & M. 72; 7 Jur. 743; 64 R. R. 647	185
— <i>c. Hooper</i> (1875), 1 Q. B. D. 45; 45 L. J. Q. B. 206; 33 L. T. 374; 24 W. R. 226	263
— <i>v. Kymer</i> (1830), 9 L. J. (o.s.) K. B. 92; 1 B. & Ad. 528; 35 R. R. 368	184
— <i>v. Liverpool Corpn.</i> , [1906] 1 K. B. 160; 74 L. J. K. B. 72; 69 J. P. 263; 3 L. G. R. 868; 21 T. L. R. 558	215
— <i>v. Nichol</i> (1841), 4 Scott, N. R. 43; 3 M. & G. 614.....	83
— <i>v. Smallcombe</i> (1868), L. R. 3 H. L. 249; 37 L. J. Ch. 793; 19 L. T. 207	41
<i>Evans & Co., Ltd. v. London County Council</i> , [1914] 3 K. B. 315; 83 L. J. K. B. 1264; 111 L. T. 288; 30 T. L. R. 509	289
<i>Everett v. Collins</i> (1810), 2 Camp. 515; 11 R. R. 785	195
<i>Ewbank v. Nutting</i> (1849), 7 C. B. 797; 78 R. R. 830	209
<i>Ewer v. Jones</i> (1846), 9 Q. B. 623; 16 L. J. Q. B. 42	4
<i>Exchange Banking Co., Re</i> (1882), 21 Ch. D. 519; 52 L. J. Ch. 217; 48 L. T. 86; 31 W. R. 174	34
<i>Eyre v. Hughes</i> (1876), 2 Ch. D. 148; 45 L. J. Ch. 395; 34 L. T. 211; 24 W. R. 597	89
<i>FAIRFIELD SHIPBUILDING Co. v. Gardner</i> (1911), 104 L. T. 288; 27 T. L. R. 281.....	161
<i>Fairlie v. Fenton</i> (1870), L. R. 5 Ex. 169; 39 L. J. Ex. 107; 22 L. T. 373; 18 W. R. 700	263
— <i>v. Hastings</i> (1803), 10 Ves. 123	219

	PAGE
Fairport, The (1882), 8 P. D. 48; 52 L. J. Ad. 21; 48 L. T. 536; 31 W. R. 610 ...	155
Faithful, The (1862), 31 L. J. Ad. 81.....	66
Faithfull v. Ewen (1878), 7 Ch. D. 495; 47 L. J. Ch. 457; 37 L. T. 805; 26 W. R. 270	153
— v. Kesteven (1910), 103 L. T. 56	108
Falk v. Fletcher (1865), 18 C. B. 403; 34 L. J. C. P. 146; 11 Jur. 176; 13 W. R. 346; 144 R. R. 542	164
Famatina Development Corp., <i>Re</i> , [1914] 2 Ch. 271; 84 L. J. Ch. 48; 30 T. L. R. 696	136, 137
Fanny, The (1883), 5 Asp. M. C. 75; 48 L. T. 771	65, 68
Farebrother v. Simmons (1822), 5 B. & A. 333; 24 R. R. 399	5
Farewell v. Coker (1728), 2 P. W. 460	73
Farley v. Turner (1857), 26 L. J. Ch. 710; 112 R. R. 442	228
Farmer v. Robinson (1805), 2 Camp. 338, n.....	283
— v. Russell (1798), 1 B. & P. 296	81
Farquharson v. King, [1902] A. C. 325; 71 L. J. K. B. 667; 86 L. T. 810; 51 W. R. 94	176, 181, 227
Farr, Smith & Co. v. Messrs, [1928] 1 K. B. 397; 97 L. J. K. B. 126; 138 L. T. 154; 53 Com. Cas. 101; 72 S. J. 14; 44 T. L. R. 49	63
Farrer v. Lacy (1885), 31 Ch. D. 42; 55 L. J. Ch. 149; 53 L. T. 515; 34 W. R. 22; 2 T. L. R. 11	75
Farrow v. Wilson (1869), L. R. 4 C. P. 744; 38 L. J. C. P. 326	279
Farrow's Bank, <i>Re</i> , [1923] 1 Ch. 41; 92 L. J. Ch. 153; 128 L. T. 332	229
Farry v. G. N. Ry., [1898] 2 Ir. R. 352	56, 216
Favenc v. Bennett (1809), 11 East, 36; 10 R. R. 425	201
Faviell v. Eastern Counties Ry. (1848), 2 Ex. 344; 6 D. & L. 54; 17 L. J. Ex. 297; 76 R. R. 615	32, 63
Fawcett v. Whitehouse (1829), 1 Russ. & M. 132; 4 L. J. (o.s.) Ch. 64; 8 L. J. (o.s.) Ch. 50; 32 R. R. 163	94
Fawcus, <i>Re</i> (1876), 3 Ch. D. 795; 34 L. T. 807	147, 228
Fawkes v. Lamb (1862), 31 L. J. Q. B. 98; 8 Jur. 385; 10 W. R. 348; 136 R. R. 846... 263	
Fay v. Miller, [1941] Ch. 360; 110 L. J. Ch. 124; 57 T. L. R. 423; [1941] 2 All E. R. 18	169, 251
Feather v. R. (1865), 6 B. & S. 257; 35 L. J. Q. B. 200; 12 L. T. 114; 141 R. R. 405... 205	
Featherstonhaugh v. Fenwick (1811), 17 Ves. 298; 11 R. R. 78	94
Feise v. Wray (1802), 3 East, 93; 6 R. R. 551.....	164
Fell v. Brown (1791), 1 Peake, 131; 3 R. R. 663.....	103
— v. Parkin (1882), 52 L. J. Q. B. 99; 47 L. T. 350	197
Fenn v. Harrison (1790), 3 T. R. 757; 4 T. R. 117	52, 172
Fenwick, <i>Re</i> , [1902] 1 Ch. 507; 71 L. J. Ch. 321; 86 L. T. 193; 9 Manson, 205.....	225
Ferguson v. Carrington (1829), 7 L. J. (o.s.) K. B. 139; 9 B. & C. 59; 3 C. & P. 457; Dans. & Lloyd, 198	40, 42
Fernée v. Gorlitz, [1915] 1 Ch. 177; 84 L. J. Ch. 404; 112 L. T. 283	252
Feronia, The (1868), L. R. 2 Ad. 65; 37 L. J. Ad. 60; 17 L. T. 619	156
Ferrers v. Robins (1835), 2 C. M. & R. 152; 1 Gale, 70; 5 Tyr. 705; 3 L. J. Ex. 220	75, 98, 105
Fiddey, <i>Re</i> (1871), L. R. 6 Ch. 865; 25 L. T. 643; 19 W. R. 1075	152
Field v. Boland (1837), 1 Dr. & Wal. 37; 56 R. R. 150	169
Fielding v. Kymer (1821), 2 B. & B. 639.....	61, 97
Filby v. Hounsell, [1896] 2 Ch. 737; 65 L. J. Ch. 852; 75 L. T. 270; 45 W. R. 232... 7	
Filmer v. Lynn (1835), 4 N. & M. 559; 1 H. & W. 59	17, 21
Finch v. Boning (1879), 4 C. P. D. 143; 40 L. T. 484; 27 W. R. 872	169
— v. Burden (1865), 12 L. T. 302	91
Findon v. McLaren (1845), 6 Q. B. 891; 14 L. J. Q. B. 183; 66 R. R. 588	231
Fine Art Soc. v. Union Bank (1886), 17 Q. B. D. 705; 56 L. J. Q. B. 70; 55 L. T. 536; 35 W. R. 114; 51 J. P. 69; 2 T. L. R. 883	271
Finlay, <i>Re</i> , [1913] 1 Ch. 564; 82 L. J. Ch. 295; 108 L. T. 699; 29 T. L. R. 436.....	141

	PAGE
<i>Finnegan v. Allen</i> , [1943] K. B. 425; 112 L. J. K. B. 323; 168 L. T. 316; [1943] 1 All E. R. 493.....	77
<i>Firbank v. Humphreys</i> (1886), 18 Q. B. D. 54; 56 L. J. Q. B. 57; 56 L. T. 36; 35 W. R. 92; 3 T. L. R. 49	250, 253
<i>Fish v. Kempton</i> (1849), 7 C. B. 687; 18 L. J. C. P. 206; 78 R. R. 798.....	202
<i>Fisher v. Drewett</i> (1879), 48 L. J. Ex. 32; 39 L. T. 253; 27 W. R. 12.....	124, 125
— <i>v. Liverpool Ins. Co.</i> (1874), L. R. 9 Q. B. 418; 43 L. J. Q. B. 114; 30 L. T. 501; 22 W. R. 951	144
— <i>v. Marsh</i> (1865), 6 B. & S. 411; 34 L. J. Q. B. 177; 12 L. T. 604; 13 W. R. 834; 11 Jur. 795; 141 R. R. 447	261
— <i>v. Miller</i> (1823), 7 Moo. 527; 1 Bing. 150; 25 R. R. 607	276
— <i>v. Oldham Corpn.</i> , [1930] 2 K. B. 364; 99 L. J. K. B. 569; 143 L. T. 281; 94 J. P. 132; 28 L. G. R. 293; 74 S. J. 299; 46 T. L. R. 390; 29 Cox, C. C. 154	216
— <i>v. Smith</i> (1878), 4 A. C. 1; 48 L. J. Ex. 411; 39 L. T. 430; 27 W. R. 113...150,	161
<i>Fitzgerald v. Dressler</i> (1850), 7 C. B. 374; 29 L. J. C. P. 113; 5 Jur. 598; 7 W. R. 190; 121 R. R. 543	172
<i>Fitzherbert v. Mather</i> (1785), 1 T. R. 12; 1 R. R. 134	223
<i>Fitzmaurice v. Bayley</i> (1856), 6 E. & B. 868; 26 L. J. Q. B. 114; 106 R. R. 827	40
<i>Fitzroy Bessemer Steel Co., Re</i> (1884), 50 L. T. 144; 32 W. R. 475	224
<i>Fitzsimons v. Duncan</i> , [1908] 2 Ir. R. 483.....	217
<i>Flanagan v. G. W. Ry.</i> (1868), 19 L. T. 345	89
<i>Platau v. Keeping</i> (1931), 36 Com. Cas. 243; 39 Ll. L. R. 232	262, 263
<i>Fleet v. Murton</i> (1871), L. R. 7 Q. B. 126; 41 L. J. Q. B. 49; 26 L. T. 181; 20 W. R. 97	247
<i>Fleming v. Bank of New Zealand</i> , [1900] A. C. 577; 69 L. J. P. C. 120; 83 L. T. 1	39
<i>Flemyng v. Hector</i> (1836), 2 M. & W. 172; 2 Gale, 180; 6 L. J. Ex. 43; 46 R. R. 553...	16
<i>Fletcher v. Jubb</i> , [1920] 1 K. B. 275; 89 L. J. K. B. 236; 122 L. T. 258; 36 T. L. R. 19	99, 109
<i>Flinn v. Hoyle</i> (1893), 63 L. J. Q. B. 1	188
<i>Flint v. Woodin</i> (1852), 22 L. J. Ch. 92; 16 Jur. 719; 19 L. T. 240; 9 Hare, 618; 89 R. R. 602	85, 87
<i>Flitcroft's Case</i> (1882), 21 Ch. D. 519; 52 L. J. Ch. 217; 48 L. T. 86; 31 W. R. 174	34, 105
<i>Florence, Re</i> (1879), 10 Ch. D. 591; 40 L. T. 15; 27 W. R. 346	230
<i>Fluker v. Taylor</i> (1855), 3 Drew. 183; 106 R. R. 310.....	92
<i>Foley v. Hill</i> (1848), 2 H. L. C. 28; 81 R. R. 14; affirming 13 L. J. Ch. 182.....	92
<i>Folkes v. King</i> , [1923] 1 K. B. 282; 92 L. J. K. B. 125; 128 L. T. 406; 39 T. L. R. 77	182, 183
<i>Food v. Morley</i> (1859), 1 F. & F. 496; 115 R. R. 949	119
<i>Ford, Re</i> , [1929] 1 Ch. 137; 98 L. J. Ch. 144; [1928] B. & C. R. 56; 140 L. T. 276; 72 S. J. 517	230
— <i>v. Newth</i> , [1901] 1 K. B. 683; 70 L. J. K. B. 459; 84 L. T. 354; 17 T. L. R. 325; 49 W. R. 345	43
<i>Foreman v. G. W. Ry.</i> (1878), 38 L. T. 851	5
<i>Forget v. Ostigny</i> , [1895] A. C. 318; 64 L. J. P. C. 62; 72 L. T. 399; 43 W. R. 590; 11 T. L. R. 323	143
<i>Forman v. The Liddesdale</i> , [1900] A. C. 190; 69 L. J. P. C. 44; 82 L. T. 331; 9 Asp. M. C. 45	42, 183
<i>Formby v. Formby</i> (1910), 102 L. T. 116	188
<i>Forristall v. Lawson</i> (1876), 34 L. T. 903	25
<i>Forshaw, Re</i> (1847), 16 Sim. 121; 17 L. J. Ch. 61; 80 R. R. 43	151
<i>Forth v. Simpson</i> (1849), 13 Q. B. 680; 18 L. J. Q. B. 263; 78 R. R. 496.....	161
<i>Foster v. Bates</i> (1843), 1 D. & L. 400; 12 M. & W. 226; 13 L. J. Ex. 88; 67 R. R. 311	36, 38, 279
— <i>v. Fyfe</i> , [1896] 2 Q. B. 104; 65 L. J. M. C. 184; 74 L. T. 784; 44 W. R. 524; 60 J. P. 423; 18 Cox, C. C. 364.....	7
— <i>v. Green</i> (1862), 30 L. J. Ex. 263; 7 H. & N. 881; 6 L. T. 390; 126 R. R. 742... 199	

	PAGE
Foster v. Pearson (1835), 1 C. M. & R. 849; 5 Tyr. 255; 4 L. J. Ex. 120; 40 R. R. 744	58, 61
Foster's Agency v. Romaine (1916), 32 T. L. R. 545	126
Fox, <i>Re</i> (1880), 15 Ch. D. 400; 50 L. J. Ch. 18; 43 L. T. 165; 29 W. R. 144	137
— v. Frith (1842), 11 L. J. Ex. 336; 10 M. & W. 131; 62 R. R. 546; C. & M. 502	243
— v. Hawks (1879), 13 Ch. D. 822; 49 L. J. Ch. 579; 42 L. T. 622; 28 W. R. 656	177
— v. Martin (1895), 64 L. J. Ch. 473	227
Foxcraft v. Wood (1828), 4 Russ. 487; 28 R. R. 161	147
Foxon v. Gascoigne (1874), L. R. 9 Ch. 654; 43 L. J. Ch. 729; 31 L. T. 289	152
Foxton v. Manchester Building Soc. (1881), 44 L. T. 406	273
Foy v. Cooper (1842), 2 Q. B. 937	100
Frampton, <i>Re</i> (1859), 1 D. F. & J. 263; 125 R. R. 443	51
France v. Clark (1883), 26 Ch. D. 257; 53 L. J. Ch. 585	227
— v. Dutton, [1891] 2 Q. B. 208; 60 L. J. Q. B. 488; 64 L. T. 793; 39 W. R. 716	8
Francis v. Francis (1854), 5 D. M. & G. 108; 104 R. R. 47	157
Franklin v. Dawson (1913), 29 T. L. R. 479	143
Franklyn v. Lamond (1847), 4 C. B. 637; 16 L. J. C. P. 221; 72 R. R. 671	98, 238
Fraser v. Balfour (1918), 87 L. J. K. B. 1116; 62 S. J. 680; 34 T. L. R. 502	205
Fray v. Voules (1859), 1 E. & E. 839; 28 L. J. Q. B. 232; 7 W. R. 446; 117 R. R. 483	75, 99, 104
Frazer v. Marsh (1811), 13 East, 238; 2 Camp. 517; 12 R. R. 336	65
Freeman v. Appleyard (1862), 1 N. R. 230; 32 L. J. Ex. 175; 7 L. T. 282; 139 R. R. 790	179
— v. East India Co. (1822), 5 B. & A. 617; 1 D. & R. 234; 24 R. R. 497	68
— v. Fairlie (1838), 8 L. J. Ch. 44; 49 R. R. 463	282
— v. Roshier (1849), 13 Q. B. 780; 18 L. J. Q. B. 340; 78 R. R. 514	40, 207
Freestone v. Butcher (1840), 9 C. & P. 643	21
French v. Howie, [1906] 2 K. B. 674; 75 L. J. K. B. 980; 95 L. T. 274	196
— v. Leeston Shipping Co., [1922] 1 A. C. 451; 91 L. J. K. B. 655; 129 L. T. 161; 39 T. L. R. 333	126, 128
Fricker v. Van Grutten, [1896] 2 Ch. 649; 65 L. J. Ch. 823; 75 L. T. 117; 45 W. R. 53	8, 252
Friend, <i>Re</i> , Friend v. Young, [1897] 2 Ch. 421; 66 L. J. Ch. 737; 77 L. T. 50; 46 W. R. 139	280
Friarwell v. King (1846), 15 Sim. 191; 74 R. R. 57	151
Frith v. Cartland (1865), 34 L. J. Ch. 301; 12 L. T. 175; 13 W. R. 493	231
— v. Forbes (1862), 4 D. F. & J. 409; 32 L. J. Ch. 10; 8 Jur. 1115; 10 W. R. 4; 7 L. T. 261; 135 R. R. 217	150
— v. Frith, [1906] A. C. 254; 75 L. J. P. C. 50; 94 L. T. 383; 54 W. R. 618; 22 T. L. R. 388	276
Frixione v. Tagliaferro (1856), 10 Moo. P. C. 175; 4 W. R. 373; 110 R. R. 21	40, 44, 136, 141
Froggatt, <i>Ex p.</i> (1843), 3 M. D. & De G. 322	229
Frontin v. Small (1726), 2 Ld. Raym. 1419; 2 Str. 705	76
Frost v. Oliver (1857), 22 L. J. Q. B. 353; 1 C. L. R. 1003; 18 Jur. 166; 95 R. R. 560	17, 66
Frowd, <i>Ex p.</i> (1861), 3 L. T. 843	175
Fruhling v. Schroder (1835), 7 C. & P. 103	259
Fry v. Fry (1864), 10 Jur. 983; 141 R. R. 796	115
— v. Smellie, [1912] 3 K. B. 282; 81 L. J. K. B. 1003; 106 L. T. 404	177
— v. Tapson (1884), 18 Ch. D. 268; 54 L. J. Ch. 224; 51 L. T. 326; 33 W. R. 113	6
Fuentes v. Montis (1868), L. R. 3 C. P. 268, 277	168
Fuller v. Benett (1842), 2 Hare, 394; 12 L. J. Ch. 355; 62 R. R. 152	225
— v. Eames (1892), 8 T. L. R. 278	125

	PAGE
Fuller v. Glyn, [1914] 2 K. B. 168; 83 L. J. K. B. 764; 110 L. T. 318; 30 T. L. R. 162; 19 Com. Cas. 186	176
— v. Wilson (1842), 3 Q. B. 58, 68, 1009; 2 G. & D. 480	212
Fullwood v. Akerman (1862), 11 C. B. 737; 132 R. R. 735	118
— v. Hurley, [1928] 1 K. B. 498; 96 L. J. K. B. 976; 139 L. T. 49; 43 T. L. R. 745	88
Furlong v. Howard (1804), 2 Sch. & Lef. 115; 53 R. R. 79	167
— v. South London Tram. Co. (1884), 48 J. P. 329; 1 C. & E. 316	216
Furnival v. Bogle (1827), 6 L. J. (o.s.) Ch. 91; 4 Russ. 142; 28 R. R. 34	63
Furnivall v. Hudson, [1893] 1 Ch. 335; 62 L. J. Ch. 178; 68 L. T. 378; 41 W. R. 358	6
Furtado v. Lumley (1890), 6 T. L. R. 168	257
Furze v. Sharwood (1841), 2 Q. B. 388; 2 G. & D. 116	13, 191
GABRIEL v. Churchill, [1914] 3 K. B. 1272; 84 L. J. K. B. 233; 111 L. T. 933; 30 T. L. R. 658	3
Gaby v. Driver (1828), 2 Y. & J. 549; 31 R. R. 629	257
Gadd v. Houghton (1876), 1 Ex. D. 357; 46 L. J. Ex. 71; 35 L. T. 222; 24 W. R. 975	188, 245
Gaetano and Maria, The (1882), 7 P. D. 137; 51 L. J. Ad. 67; 46 L. T. 835	65
Galam, The (1863), 33 L. J. Ad. 97; 2 Moo. P. C. 216; Br. & Lush. 167; 10 Jur. 477; 12 W. R. 495; 9 L. T. 350; 3 N. R. 254; 141 R. R. 45	155
Galland, Re (1885), 31 Ch. D. 296; 53 L. T. 921; 34 W. R. 158	151
— v. Hall (1888), 4 T. L. R. 761	258
Gardiner v. Heading, [1928] 2 K. B. 284; 97 L. J. K. B. 766; 139 L. T. 449	236
Gardner v. Baillie (1796), 6 T. R. 591; 3 R. R. 531, 538	50
— v. Lachlan (1838), 4 Myl. & C. 129; 6 Sim. 407; 8 Sim. 123; 8 L. J. Ch. 82; 2 Jur. 412; 42 R. R. 124	276
— v. McCutcheon (1842), 4 Beav. 534; 55 R. R. 114	84, 98
Garforth v. Essam (1892), 56 J. P. 521; 8 T. L. R. 243	7
Garth v. Howard (1832), 1 M. & Scott, 628; 8 Bing. 451; 5 C. & P. 346; 1 L. J. C. P. 129; 34 R. R. 753	200
Gaskell v. Chambers (1858), 26 Beav. 300; 28 L. J. Ch. 385	95
Gasson v. Cole (1910), 26 T. L. R. 468	143
Gatty v. Field (1846), 9 Q. B. 431	284
Gauntlett v. King (1857), 3 C. B. 59; 111 R. R. 539	207
Gaussen v. Morton (1830), 8 L. J. (o.s.) K. B. 313; 10 B. & C. 731; 5 Man. & R. 613; 34 R. R. 558	276
Geilinger v. Gibbs, [1897] 1 Ch. 479; 66 L. J. Ch. 230; 76 L. T. 111; 45 W. R. 315	262
General Exchange Bank v. Horner (1869), L. R. 9 Eq. 480; 39 L. J. Ch. 393; 22 L. T. 693; 18 W. R. 414	74, 95
General Share Co. v. Chapman (1877), 46 L. J. C. P. 79; 36 L. T. 179	162
George v. Claggett (1797), 7 T. R. 359; 2 Esp. 557; 4 R. R. 462	202
Georges v. Georges (1811), 18 Ves. 294	151
Gerahty v. Baines (1903), 19 T. L. R. 554	121
German Property Administrator v. Knoop, [1933] Ch. 429; 102 L. J. Ch. 156; 148 L. T. 468	6
Gerson v. Simpson, [1903] 2 K. B. 197; 72 L. J. K. B. 603; 89 L. T. 117; 51 W. R. 610; 10 Manson, 382	273
Gibbon v. Peace, [1905] 1 K. B. 810; 74 L. J. K. B. 502; 92 L. T. 433; 21 T. L. R. 365; 53 W. R. 417	77
Gibbs v. Daniel (1862), 4 Giff. 1; 10 W. R. 688; 7 L. T. 27; 9 Jur. 636; 141 R. R. 124	88
— v. Grey (1857), 2 H. & N. 22; 26 L. J. Ex. 286; 115 R. R. 408	68
Giblin v. McMullen (1869), L. R. 2 C. P. 317; 38 L. J. P. C. 25	107
Gibson, Ex p. (1887), 55 L. T. 817	281

	PAGE
<i>Gibson v. Crick</i> (1862), 1 H. & C. 142; 31 L. J. Ex. 304; 6 L. T. 392; 10 W. R. 525; 2 F. & F. 766; 130 R. R. 425	121
— <i>v. Jeyes</i> (1801), 6 Ves. 266; 5 R. R. 295	89
— <i>v. May</i> (1853), 4 D. M. & G. 512; 102 R. R. 246	151
— <i>v. Minet</i> (1824), 2 L. J. (o.s.) C. P. 90; 9 Moo. 31; 2 Bing. 7; 1 C. & P. 247; Ry. & M. 68	259, 284
— <i>v. Winter</i> (1833), 5 B. & Ad. 96; 2 N. & M. 737; 2 L. J. K. B. 130; 39 R. R. 411	266
<i>Gidley v. Palmerston</i> (1822), 3 B. & B. 275; 7 Moo. 91; 24 R. R. 668	260
<i>Gieve, Re</i> , [1899] 1 Q. B. 794; 68 L. J. Q. B. 509; 80 L. T. 438; 47 W. R. 441; 15 T. L. R. 251	143
<i>Giles v. Perkins</i> (1807), 9 East, 12	229
— <i>v. Taff Vale Ry.</i> (1853), 2 E. & B. 822; 23 L. J. Q. B. 43; 95 R. R. 832	215
<i>Gill v. Kymer</i> (1821), 5 Moo. 503	61, 97
— <i>v. Shepherd</i> (1902), 8 Com. Cas. 48; 19 T. L. R. 17	102
<i>Gillard v. Wise</i> (1826), 4 L. J. (o.s.) K. B. 88; 7 D. & R. 523; 5 B. & C. 134; 29 R. R. 190	81
<i>Gilleghan v. Minister of Health</i> , [1932] 1 Ch. 86; 101 L. J. Ch. 81; 146 L. T. 231; 47 T. L. R. 439	235
<i>Gillett v. Peppercoorne</i> (1840), 3 Beav. 78; 52 R. R. 38	84
<i>Gillow v. Aberdare</i> (1893), 9 T. L. R. 12	51, 132, 275
<i>Gilman v. Elton</i> (1821), 6 Moo. 243; 3 B. & B. 75; 23 R. R. 567	231
— <i>v. Robinson</i> (1825), 1 Ry. & Moo. 226; 1 C. & P. 642; 28 R. R. 795	17
<i>Gladman v. Johnson</i> (1867), 36 L. J. C. P. 153; 15 L. T. 476; 15 W. R. 313	223
<i>Gladstone v. King</i> (1813), 1 M. & S. 35; 14 R. R. 392	223
<i>Glasgow, The</i> (1856), Swa. 145	67
<i>Glasgow Ass. Corpn. v. Symondson</i> (1911), 104 L. T. 254; 27 T. L. R. 245; 11 Asp. M. C. 583; 16 Com. Cas. 109	5
<i>Glasgow Corpn. v. Lorimer</i> , [1911] A. C. 209; 80 L. J. P. C. 175; 104 L. T. 354	217
<i>Gleadow v. Hull Glass Co.</i> (1849), 19 L. J. Ch. 44; 15 Beav. 200; 13 Jur. 1020	44
<i>Gloucester Bank v. Rudry, etc. Colliery Co.</i> , [1895] 1 Ch. 629; 64 L. J. Ch. 451; 72 L. T. 375; 43 W. R. 486	171
<i>Gloucester Election Petition, Re</i> , [1901] 1 K. B. 683; 70 L. J. K. B. 459; 84 L. T. 354; 17 T. L. R. 325; 49 W. R. 345	43
<i>Glover v. Langford</i> (1892), 8 T. L. R. 628	188, 244
<i>Gluckstein v. Barnes</i> , [1900] A. C. 240; 69 L. J. Ch. 385; 82 L. T. 393; 7 Manson, 321	86, 95
<i>Glyn v. Baker</i> (1811), 13 East, 509; 12 R. R. 414	214
<i>Glynn v. Houstoun</i> (1841), 2 M. & G. 337; 2 Scott, N. R. 548	206
<i>Gobind Chunder Sein v. Ryan</i> (1861), 9 Moo. Ind. App. 140; 5 L. T. 559; 15 Moo. P. C. 230; 8 Jur. 343; 10 W. R. 155; 137 R. R. 141	180
<i>Godefroy v. Dalton</i> (1830), 8 L. J. (o.s.) C. P. 79; 6 Bing. 460; 4 M. & P. 149; 31 R. R. 467	99, 108
— <i>v. Jay</i> (1831), 7 Bing. 413; 5 M. & P. 284; 33 R. R. 528	109
<i>Godfrey v. Furzo</i> (1733), 3 P. W. 186	229
<i>Godin v. London Ass. Co.</i> (1758), 1 W. Bl. 103	147, 163
<i>Godwin v. Francis</i> (1870), L. R. 5 C. P. 295; 39 L. J. C. P. 121; 22 L. T. 338	255
<i>Goff v. Gt. N. Ry.</i> (1861), 3 E. & E. 672; 30 L. J. Q. B. 148; 3 L. T. 850; 7 Jur. 286; 122 R. R. 889	216
<i>Goh Choo Sing v. Lee Kim Soo</i> , [1925] A. C. 550; 94 L. J. P. C. 129; 133 L. T. 65... ..	207
<i>Gokal Chand-Jagan Nath v. Nand Ram Das-Atma Ram</i> , [1939] A. C. 106; 108 L. J. P. C. 9; 55 T. L. R. 15	46
<i>Gold v. Essex C.C.</i> , [1942] 2 K. B. 293; 167 L. T. 166; 58 T. L. R. 357; [1942] 2 All E. R. 237	215
<i>Gold Reefs of Western Australia v. Dawson</i> , [1897] 1 Ch. 115; 66 L. J. Ch. 147; 75 L. T. 575; 45 W. R. 285	262
<i>Golding v. Royal London Auxiliary Ins. Co.</i> (1914), 30 T. L. R. 350	223
<i>Goldschmidt v. Lyon</i> (1812), 4 Taunt. 534; 13 R. R. 670	138

	PAGE
<i>Gomez, Ex p.</i> (1875), L. R. 10 Ch. 639; 32 L. T. 677; 23 W. R. 780	150
<i>Gomme v. Franklin</i> (1859), 1 F. & F. 465; 115 R. R. 941	29
<i>Gompertz v. Cook</i> (1904), 20 T. L. R. 106	183, 227
<i>Goodall v. Lowndes</i> (1844), 6 Q. B. 464; 66 R. R. 463	256
<i>Goodfellow v. Gray</i> , [1899] 2 Q. B. 498; 68 L. J. Q. B. 1032; 81 L. T. 314	155
<i>Goodland v. Blewitt</i> (1808), 1 Camp. 477; 10 R. R. 731	169
<i>Goodman v. Harvey</i> (1836), 4 A. & E. 870; 6 N. & M. 372; 43 R. R. 507	177
<i>Goodson v. Brooke</i> (1815), 4 Camp. 163	56
<i>Goodtitle v. Woodward</i> (1819), 3 B. & A. 689	38
<i>Goodwin v. Roberts</i> (1876), 1 A. C. 476; 35 L. T. 179; 45 L. J. Ex. 748	178
<i>Goodyear v. Part</i> (1897), 13 T. L. R. 395	20
<i>Goom v. Affalo</i> (1826), 5 L. J. (o.s.) K. B. 31; 6 B. & C. 117; 9 D. & R. 148; 30 R. R. 262	191
<i>Gordon v. Ellis</i> (1846), 3 D. & L. 803; 2 C. B. 821; 15 L. J. C. P. 178	202
— <i>v. James</i> (1885), 30 Ch. D. 249; 53 L. T. 641; 34 W. R. 217	176
<i>Gosling v. Birnie</i> , 9 L. J. (o.s.) C. P. 105; 7 Bing. 339; 5 M. & P. 160; 33 R. R. 497	83
— <i>v. Gaskell</i> , [1897] A. C. 575; 66 L. J. Q. B. 848; 77 L. T. 314; 13 T. L. R. 544	12
<i>Gosling's Case</i> (1829), 3 Sim. 301	222
<i>Gothenburg Commercial Co., Re</i> (1881), 44 L. T. 166; 29 W. R. 358	229
<i>Gough, Re</i> (1894), 70 L. T. 725	151
<i>Gould v. S. E. & C. Ry.</i> , [1920] 2 K. B. 186; 89 L. J. K. B. 700; 123 L. T. 256	48
<i>Goupy v. Harden</i> (1816), 2 Marsh. 454; 7 Taunt. 159; Holt 342; 17 R. R. 478	103
<i>Govier v. Hancock</i> (1796), 6 T. R. 603; 3 R. R. 271	27
<i>Gowers v. Lloyds and National Provincial Foreign Bank, Ltd.</i> , [1938] W. N. 106; 158 L. T. 467; 54 T. L. R. 550; 1 All E. R. 766	256, 258
<i>Graham v. Ackroyd</i> (1852), 10 Hare, 192; 22 L. J. Ch. 1046	135
— <i>v. Fretwell</i> (1841), 3 M. & G. 368	14
— <i>v. Musson</i> (1839), 7 Scott, 769; 3 Bing. N. C. 603; 8 L. J. C. P. 324; 50 R. R. 807	14, 30
— <i>v. Public Works Commrs.</i> , [1901] 2 K. B. 781; 70 L. J. K. B. 860; 85 L. T. 96; 50 W. R. 122; 65 J. P. 677	235
<i>Grant v. Fletcher</i> (1826), 5 B. & C. 436; 8 D. & R. 59; 29 R. R. 286	97, 191
— <i>v. Gold Exploration, etc. Syndicate</i> , [1900] 1 Q. B. 233; 69 L. J. Q. B. 150; 82 L. T. 5; 48 W. R. 280; 16 T. L. R. 86	233
— <i>v. Mills</i> (1813), 2 Ves. & B. 306; 13 R. R. 101	162
— <i>v. Norway</i> (1851), 10 C. B. 665; 20 L. J. C. P. 93; 84 R. R. 747; 15 Jur. 296	65, 68
— <i>v. U. K. Switchback Ry.</i> (1888), 40 Ch. D. 135; 5 T. L. R. 92	41
<i>Gratitude, The</i> (1801), 3 Rob. 240	67
<i>Graves v. Legg</i> (1857), 2 H. & N. 210; 26 L. J. Ex. 316; 115 R. R. 497	191, 222
— <i>v. Masters</i> (1883), 1 C. & E. 73	54, 172
<i>Gray v. Gutteridge</i> (1827), 6 L. J. (o.s.) K. B. 154; 3 C. & P. 40; 1 Man. & R. 614; 31 R. R. 343	98, 257
— <i>v. Haig</i> (1854), 20 Beav. 219; 109 R. R. 396	74, 76, 97, 132
— <i>v. Johnston</i> (1868), L. R. 3 H. L. 1; 16 W. R. 842	273
— <i>v. Kirby</i> (1834), 2 Dowl. 601	73
— <i>v. Pearson</i> (1870), L. R. 5 C. P. 568; 23 L. T. 416	262
— <i>v. Raper</i> (1866), L. R. 1 C. P. 694; 14 W. R. 780	243
<i>Gray (Miss), Ltd. v. Cathcart</i> (1922), 38 T. L. R. 562	20
<i>Great Britain, etc. I. Ass. v. Wyllie</i> (1889), 22 Q. B. D. 710; 58 L. J. Q. B. 614; 60 L. T. 916; 37 W. R. 407; 5 T. L. R. 285	187
<i>Great Eastern, The</i> (1868), L. R. 2 Ad. 88; 17 L. T. 667	17
<i>Great Luxembourg Ry. v. Magnay</i> (1858), 25 Beav. 586; 119 R. R. 555	86
<i>Great Northern Ry. v. Swaffield</i> (1874), L. R. 9 Ex. 132; 43 L. J. Ex. 89; 30 L. T. 562	14

	PAGE
Great Western Ins. Co. of New York v. Cunliffe (1874), L. R. 9 Ch. 525; 30 L. T. 661; 43 L. J. Ch. 741	92, 96
Great Western Ry. v. L. & C. Bank, [1901] A. C. 414; 70 L. J. K. B. 915; 85 L. T. 152; 50 W. R. 50; 6 Com. Cas. 275	271
— v. Willis (1865), 18 C. B. 748; 34 L. J. C. P. 195; 12 L. T. 349; 144 R. R. 652	220
Green v. Bartlett (1863), 14 C. B. 681; 32 L. J. C. P. 261; 8 L. T. 503; 11 W. R. 834; 2 M. R. 279; 135 R. R. 868	122
— v. Elgie (1843), 5 Q. B. 99; D. & M. 199; 14 L. J. Q. B. 162	269
— v. Hopke (1856), 18 C. B. 549; 25 L. J. C. P. 297; 107 R. R. 404	244
— v. L. G. O. Co. (1859), 7 C. B. 290; 29 L. J. C. P. 13; 8 Jur. 228; 2 L. T. 95; 8 W. R. 88; 121 R. R. 497	210
— v. Lucas (1876), 33 L. T. 584; 31 L. T. 731	125
— v. Maitland (1842), 4 Beav. 524	83
— v. Mules (1861), 30 L. J. C. P. 343; 126 R. R. 894	119
— v. Tughan (1913), 30 T. L. R. 64	96
— v. Whitehead, [1930] 1 Ch. 38; 99 L. J. Ch. 153; 142 L. T. 1; 46 T. L. R. 11 ...	50
Greenway v. Atkinson (1881), 29 W. R. 560	259
— v. Hurd (1792), 4 T. R. 553; 40 R. R. 861, 862, 865, 866	256
Greenwood, <i>Ex p.</i> (1862), 6 L. T. 558	230
— v. Leather Shod Wheel Co., [1900] 1 Ch. 421; 69 L. J. Ch. 131; 81 L. T. 595; 7 Manson, 201	273
— v. Martins Bank, [1933] A. C. 51; 101 L. J. K. B. 622; 147 L. T. 441; 38 Com. Cas. 54; 76 S. J. 544; 48 T. L. R. 601	34
— v. Seymour (1861), 30 L. J. Ex. 327; 7 H. & N. 355; 9 W. R. 785; 4 L. T. 833; 123 R. R. 868	216
Greer v. Downs Supply Co., [1927] 2 K. B. 28; 96 L. J. K. B. 534; 137 L. T. 174	186, 201
— v. Young (1882), 24 Ch. D. 545; 52 L. J. Ch. 915; 49 L. T. 224; 31 W. R. 930	153
Gregory v. Cotterell (1855), 5 E. & B. 571; 25 L. J. Q. B. 33; 2 Jur. 16; 4 W. R. 48; 26 L. T. 125; 103 R. R. 629	6
— v. Parker (1808), 1 Camp. 394; 10 R. R. 712	28
— v. Piper (1829), 9 B. & C. 591; 4 M. & R. 500; 33 R. R. 268	207
Gregson v. Ruck (1843), 4 Q. B. 737; 62 R. R. 475	191
Grenville-Murray v. Clarendon (1869), L. R. 9 Eq. 11	261
Gresley v. Mousley (1862), 31 L. J. Ch. 537	89
Gretton v. Mees (1878), 7 Ch. D. 839; 38 L. T. 506; 26 W. R. 607	169
Grey, <i>Re</i> (1892), 8 T. L. R. 694	116
Grice v. Kenrick (1870), L. R. 5 Q. B. 340; 39 L. J. Q. B. 175; 22 L. T. 743; 18 W. R. 1155	265
Griffin v. Weatherby (1868), L. R. 3 Q. B. 753; 37 L. J. Q. B. 280; 18 L. T. 881; 9 B. & S. 726; 17 W. R. 8	258
Griffiths v. Williams (1787), 1 T. R. 710	71
Griffiths Cycle Corp. v. Humber, [1899] 2 Q. B. 414; 68 L. J. Q. B. 959; 81 L. T. 310	30, 64
Grindell v. Baas, [1920] 2 Ch. 487; 89 L. J. Ch. 591; 36 T. L. R. 867	63
— v. Godmond (1836), 1 N. & P. 168; 2 H. & W. 339; 5 A. & E. 755; 6 L. J. K. B. 31; 44 R. R. 573	25
Grindley v. Barker (1798), 1 B. & P. 229; 4 R. R. 787	9
Grissell v. Bristowe (1869), L. R. 4 C. P. 36; 38 L. J. C. P. 10; 19 L. T. 309; 17 W. R. 123	193
— v. Peto (1832), 1 L. J. C. P. 140; 9 Bing. 1; 2 M. & S. 2	100
Grizewood v. Blane (1851), 11 C. B. 526, 538	143
Grogan v. Smith (1890), 7 T. L. R. 132	125
Groom v. Cheesewright, [1895] 1 Ch. 730; 72 L. T. 555; 43 W. R. 475	168
— v. Crocker (1938), 54 T. L. R. 861; 60 Ll. L. R. 393; 158 L. T. 477; [1938] 2 All E. R. 394	99

	PAGE
<i>Groom v. Grimes</i> (1903), 89 L. T. 129; 67 J. P. 345; 20 Cox, C. C. 515	286
<i>Gross, Re, ex p. Adair</i> (1871), 24 L. T. 198	273
—, <i>Re, ex p. Kingston</i> (1871), L. R. 6 Ch. 632; 40 L. J. Bk. 91	159, 273
<i>Grove v. Dubois</i> (1786), 1 T. R. 112; 6 Taunt. 521; 16 R. R. 664	3
<i>Grover v. Mathews</i> , [1910] 2 K. B. 401; 79 L. J. K. B. 1025; 102 L. T. 650; 26 T. L. R. 411	37
<i>Guerreiro v. Peile</i> (1820), 3 B. & A. 616; 22 R. R. 500	60, 76, 97
<i>Guiohard v. Morgan</i> (1819), 4 Moo. 36	60
<i>Gullischen v. Stewart</i> (1884), 13 Q. B. D. 317; 53 L. J. Q. B. 173; 50 L. T. 47; 32 W. R. 763	240
<i>Gunn v. Roberts</i> (1874), L. R. 9 C. P. 331; 43 L. J. C. P. 233; 30 L. T. 424; 22 W. R. 652	39, 66
— <i>v. Showell's Brewery Co.</i> (1902), 50 W. R. 659	123
<i>Gurnell v. Gardner</i> (1863), 4 Giff. 626; 9 L. T. 367; 12 W. R. 67	276
<i>Gurney v. Womersley</i> (1854), 4 E. & B. 133; 24 L. J. Q. B. 46; 99 R. R. 390	238, 247, 256
<i>Guthrie v. Armstrong</i> (1822), 5 B. & A. 628	9
<i>Guy v. Churchill</i> (1887), 35 Ch. D. 489; 56 L. J. Ch. 670; 57 L. T. 510; 35 W. R. 706; 3 T. L. R. 600	153
<i>Gwatkin v. Campbell</i> (1854), 1 Jur. 131	74, 87
<i>Gwilliam v. Twist</i> , [1895] 2 Q. B. 84; 64 L. J. Q. B. 474; 72 L. T. 579; 43 W. R. 506; 59 J. P. 484	15, 69, 210
<i>HAAS v. Durrant</i> , [1900] 1 Ch. 209; 69 L. J. Ch. 255; 81 L. T. 776	74, 140, 141, 279
<i>Hackney v. Knight</i> (1891), 7 T. L. R. 254	213
<i>Hadley v. Baxendale</i> (1854), 9 Ex. 341; 23 L. J. Ex. 182; 96 R. R. 742	109
<i>Hagedorn v. Oliverson</i> (1814), 2 M. & S. 485; 15 R. R. 317	36
<i>Hahn v. North German Pitwood Co.</i> (1892), 8 T. L. R. 557	244
<i>Haines v. Busk</i> (1814), 5 Taunt. 521; 1 Marsh. 191	131
<i>Halbot v. Lens</i> , [1901] 1 Ch. 344; 70 L. J. Ch. 125; 83 L. T. 702; 49 W. R. 214 ...	251
<i>Halbronn v. Internatl. Horse Agency</i> , [1903] 1 K. B. 270; 72 L. J. K. B. 90; 88 L. T. 232; 51 W. R. 622; 19 T. L. R. 138	137
<i>Hale, Re</i> , [1899] 2 Ch. 107; 68 L. J. Ch. 517; 80 L. T. 827; 47 W. R. 579	12, 220
<i>Halifax Sugar Co., Re</i> (1891), 7 T. L. R. 293	222
<i>Halifax Union v. Wheelwright</i> (1875), L. R. 10 Ex. 183; 44 L. J. Ex. 121	145
<i>Hall and Barker, Re</i> (1878), 9 Ch. D. 538; 47 L. J. Ch. 621; 26 W. R. 501	126
<i>Hall, Ex p.</i> (1879), 10 Ch. D. 615; 48 L. J. Bk. 79; 40 L. T. 179; 27 W. R. 385 ...	258
— <i>v. Ashurst</i> (1833), 2 L. J. Ex. 295; 1 C. & M. 714; 3 Tyr. 420	244
— <i>v. Benson</i> (1836), 7 C. & P. 711	118
— <i>v. Fuller</i> (1826), 4 L. J. (o.s.) K. B. 297; 5 B. & C. 750; 8 D. & R. 464; 29 R. R. 383	145
— <i>v. Laver</i> (1842), 1 Hare, 571; 4 Y. & C. 216; 5 Jur. 241; 58 R. R. 198 ...	46, 157
— <i>v. Lees</i> , [1904] 2 K. B. 602; 73 L. J. K. B. 819; 91 L. T. 20; 53 W. R. 17; 20 T. L. R. 678	2, 215
<i>Haller v. Norman</i> (1861), 3 L. T. 741; 9 W. R. 348	221
<i>Hallett, Re</i> , [1894] 2 Q. B. 237; 63 L. J. Q. B. 573; 10 T. L. R. 287	228
<i>Hallett's Estate, Re</i> (1880), 13 Ch. D. 696; 49 L. J. Ch. 415; 42 L. T. 421; 28 W. R. 732	228
<i>Hambro v. Burnand</i> , [1904] 2 K. B. 10; 73 L. J. K. B. 669; 90 L. T. 803; 52 W. R. 583; 9 Com. Cas. 251; 20 T. L. R. 398	167
<i>Hamburg, The</i> (1863), 2 Moo. P. C. 289; 33 L. J. Ad. 116; 10 L. T. 206; 10 Jur. 600; 12 W. R. 628; 41 R. R. 77	67
<i>Hamer v. Sharp</i> (1874), L. R. 19 Eq. 108; 44 L. J. Ch. 53; 31 L. T. 643	57, 75, 173
<i>Hamill v. Lilley</i> (1887), 3 T. L. R. 265	227
<i>Hamilton v. Clancy</i> , [1914] 2 Ir. R. 514; 48 Ir. L. T. 207	267
— <i>v. Spottiswoode</i> (1849), 4 Ex. 200; 18 L. J. Ex. 393; 80 R. R. 519	259, 276

	PAGE
<i>Hamilton v. Young</i> (1881), 7 L. R. Ir. 289	60, 86
<i>Hamilton's Windsor Ironworks Co., Re</i> , (1879) 12 Ch. D. 707; 39 L. T. 658; 27 W. R. 445	55
<i>Hammond, Re</i> (1869), 20 L. T. 547; 17 W. R. 665	230
— <i>v. Thorpe</i> (1834), 3 L. J. Ex. 358; 1 C. M. & R. 64; 4 Tyr. 838; 2 Dow. P. C. 721	252
<i>Hammonds v. Barclay</i> (1802), 2 East, 227	148
<i>Hamond v. Holiday</i> (1824), 1 C. & P. 384	134
<i>Hampden v. Walsh</i> (1876), 1 Q. B. D. 189; 45 L. J. Q. B. 238; 33 L. T. 852; 24 W. R. 607	284
<i>Hampshire Land Co., Re</i> , [1896] 2 Ch. 743; 65 L. J. Ch. 860	222
<i>Hampstead Guardians v. Barclays Bank</i> (1923), 39 T. L. R. 229	272
<i>Hampton & Sons, Ltd. v. George</i> , [1939] 3 All E. R. 627	130
<i>Hanbury, Re</i> (1897), 75 L. T. 449	151
<i>Hancock v. Hodgson</i> (1827), 5 L. J. (o.s.) C. P. 170; 12 Moo. 504; 4 Bing. 269	240
— <i>v. Smith</i> (1889), 41 Ch. D. 456; 58 L. J. Ch. 725; 61 L. T. 341; 5 T. L. R. 459	228
<i>Hands v. Andrews</i> (1893), 9 T. L. R. 238	116
<i>Hankey v. Vernon</i> (1787), 3 Bro. C. C. 313	281
<i>Hanley v. Cassan</i> (1847), 11 Jur. 1088; 81 R. R. 932; 10 L. T. 189	73
<i>Hannaford v. Syms</i> (1898), 79 L. T. 30	71, 73
<i>Hannan v. Beeton</i> (1889), 5 T. L. R. 703	143
<i>Hannan's v. Armstrong</i> (1900), 5 Com. Cas. 188	272
<i>Hanson v. Roberdeau</i> (1792), 1 Peake, 163	238
— <i>v. Waller</i> , [1901] 1 K. B. 390; 70 L. J. K. B. 231; 84 L. T. 91; 49 W. R. 445	55, 211
<i>Hardaker v. Idle Dist. Council</i> , [1896] 1 Q. B. 335; 65 L. J. Q. B. 363; 74 L. T. 69; 44 W. R. 323; 12 T. L. R. 207	6
<i>Hardcastle, Ex p.</i> (1881), 44 L. T. 523; 29 W. R. 615	228
— <i>v. Bielby</i> , [1892] 1 Q. B. 709; 61 L. J. M. C. 101; 66 L. T. 343	286
<i>Hardie v. Grant</i> (1838), 8 C. & P. 512	27
<i>Hardwicke v. Vernon</i> (1808), 14 Ves. 504; 9 R. R. 329	91, 116
<i>Hardy v. Caley</i> (1864), 33 Beav. 365	272
<i>Hare and O'More's Contract, Re</i> , [1901] 1 Ch. 93; 70 L. J. Ch. 45; 83 L. T. 672; 49 W. R. 202	283
<i>Hargrave v. Hargrave</i> (1850), 12 Beav. 408; 19 L. J. Ch. 261; 85 R. R. 131; 14 Jur. 212	62
<i>Harington v. Hoggart</i> (1830), 1 B. & Ad. 577; 9 L. J. (o.s.) K. B. 14; 35 R. R. 382	116
<i>Harker v. Edwards</i> (1887), 57 L. J. Q. B. 147; 4 T. L. R. 92	58, 59, 138
<i>Harley v. Nagata</i> (1917), 34 T. L. R. 124; 23 Com. Cas. 121	120
<i>Harmer v. Armstrong</i> , [1934] Ch. 65; 103 L. J. Ch. 1; 149 L. T. 579	189
— <i>v. Bell</i> (1850), 7 Moo. P. C. 267; 19 L. T. 235; 14 Jur. 134; 83 R. R. 43	155
— <i>v. Cornelius</i> (1858), 28 L. J. C. P. 85; 5 C. B. 236; 4 Jur. 1110; 116 R. R. 654; 6 W. R. 749	77
<i>Harper, Ex p.</i> (1882), 20 Ch. D. 685; 51 L. J. Ch. 810; 47 L. T. 177; 30 W. R. 650	152
— <i>v. Godsell</i> (1870), L. R. 5 Q. B. 422; 39 L. J. Q. B. 185; 18 W. R. 954	49
— <i>v. Keller</i> (1915), 84 L. J. K. B. 1696; 113 L. T. 175; 31 T. L. R. 284; 20 Com. Cas. 291	188, 236
— <i>v. Vigers</i> , [1909] 2 K. B. 549; 78 L. J. K. B. 867; 100 L. T. 887; 25 T. L. R. 627	261
— <i>v. Williams</i> (1843), 4 Q. B. 219; 12 L. J. Q. B. 227; 62 R. R. 334	245, 261
<i>Harrald, Re</i> (1884), 53 L. J. Ch. 505; 51 L. T. 441	156
<i>Harrington v. Churchward</i> (1860), 29 L. J. Ch. 521; 8 W. R. 302; 6 Jur. 576; 121 R. R. 323	165
— <i>v. Victoria Dock</i> (1878), 3 Q. B. D. 549; 47 L. J. Q. B. 594; 39 L. T. 120; 26 W. R. 740	112, 266

TABLE OF CASES.

xxix

	PAGE
<i>Harris v. Fiat Motors</i> (1906), 22 T. L. R. 556	69, 210
— <i>v. Lee</i> (1718), 1 P. W. 482	25
— <i>v. Morris</i> (1801), 4 Esp. 41; 2 R. R. 786	26, 28
— <i>v. Nickerson</i> (1873), L. R. 8 Q. B. 286; 42 L. J. Q. B. 171; 28 L. T. 410; 21 W. R. 635	239
— <i>v. Osbourn</i> (1834), 2 C. & M. 629; 4 Tyr. 445; 3 L. J. Ex. 182; 39 R. R. 872... ..	100
— <i>v. Petherick</i> (1878), 39 L. T. 543	125, 127
— <i>v. Quine</i> (1869), L. R. 4 Q. B. 653; 38 L. J. Q. B. 331	126
— <i>v. Truman</i> (1882), 9 Q. B. D. 264; 51 L. J. Q. B. 338; 46 L. T. 844; 30 W. R. 533	231
<i>Harrison, Ex p.</i> (1893), 69 L. T. 204	18
—, <i>Re</i> (1858), 2 De G. & J. 194; 27 L. J. Bk. 5	229
— <i>v. Grady</i> (1865), 13 L. T. 369; 14 W. R. 139; 12 Jur. 140; 149 R. R. 515... ..	20, 21, 25
— <i>v. Harrison</i> (1888), 13 P. D. 180; 58 L. J. P. 28; 60 L. T. 39; 36 W. R. 748; 4 T. L. R. 646	152
— <i>v. Jackson</i> (1797), 7 T. R. 207; 5 R. R. 422	31
—, — <i>v.</i> (1699), 12 Mod. 346	284
<i>Harrods, Ltd. v. Geneen</i> , [1938] 4 All E. R. 493; 55 T. L. R. 139	127
— <i>v. Lemon</i> , [1931] 2 K. B. 157; 100 L. J. K. B. 219; 144 L. T. 657; 75 S. J. 119; 47 T. L. R. 248	76, 134
<i>Harsant v. Blaine</i> (1887), 56 L. J. Q. B. 511; 3 T. L. R. 689	77, 115
<i>Hart v. Frame</i> (1839), 6 C. & F. 193; M. & R. 595; 3 Jur. 547; 49 R. R. 88.....	108
<i>Hartas v. Ribbons</i> (1889), 22 Q. B. D. 254; 5 T. L. R. 200	146
<i>Hartop, Ex p.</i> (1806), 12 Ves. 352	237, 247
<i>Harvey v. Norton</i> (1840), 4 Jur. 42	24, 28
<i>Haseler v. Lemoyne</i> (1858), 5 C. B. 530; 28 L. J. C. P. 103; 116 R. R. 753	40, 207
<i>Haslam, Re</i> , [1902] 1 Ch. 765; 71 L. J. Ch. 734; 86 L. T. 663; 50 W. R. 444	90, 95
<i>Hasluck, Ex p.</i> (1894), 1 Manson, 218	276
<i>Hassell v. Stanley</i> , [1896] 1 Ch. 607; 65 L. J. Ch. 494; 74 L. T. 375; 44 W. R. 405... ..	154
<i>Hastelow v. Jackson</i> (1828), 6 L. J. (o.s.) K. B. 318; 8 B. & C. 221; 2 M. & R. 209; 32 R. R. 369	284
<i>Hastings v. Pearson</i> , [1893] 1 Q. B. 62; 62 L. J. Q. B. 75; 67 L. T. 553; 41 W. R. 127; 9 T. L. R. 18	182
<i>Hatch v. Hale</i> (1850), 15 Q. B. 10; 19 L. J. Q. B. 289; 81 R. R. 480; 14 Jur. 459... ..	56, 207
— <i>v. L. & N. W. Ry.</i> (1899), 15 T. L. R. 246	211
— <i>v. Searles</i> (1854), 24 L. J. Ch. 22; 3 W. R. 49; 97 R. R. 139	168
<i>Hathesing v. Laing</i> (1873), L. R. 17 Eq. 92; 43 L. J. Ch. 233	163, 164
<i>Hatsall v. Griffith</i> (1834), 2 C. & M. 679; 3 L. J. Ex. 191; 4 Tyr. 487	8, 80
<i>Hawke v. Hulton & Co., Ltd.</i> , [1909] 2 K. B. 93; 78 L. J. K. B. 633; 100 L. T. 905; 25 T. L. R. 474	289
<i>Hawken v. Bourne</i> (1841), 10 L. J. Ex. 361; 8 M. & W. 703; 58 R. R. 853	55, 169
<i>Hawkes v. Cottrell</i> (1858), 3 H. & N. 243; 27 L. J. Ex. 369; 117 R. R. 672	126
— <i>v. Dunn</i> (1831), 9 L. J. (o.s.) Ex. 184; 1 Tyr. 413; 1 C. & J. 519	164
<i>Hawkins v. Harwood</i> (1849), 4 Ex. 503	108
— <i>v. Kemp</i> (1803), 3 East, 410	7
— <i>v. Maltby</i> (1869), L. R. 4 Ch. 200; 38 L. J. Ch. 313; 20 L. T. 335; 17 W. R. 557	193
— <i>v. Pearse</i> (1903), 9 Com. Cas. 87	75
<i>Hawley v. Sentance</i> (1863), 7 L. T. 745; 11 W. R. 311	40
<i>Hawtayne v. Bourne</i> (1841), 7 M. & W. 595; 10 L. J. Ex. 224; 5 Jur. 118; 56 R. R. 806	15, 55
<i>Hay v. Goldsmidt</i> (1804), 1 Taunt. 349; 2 Smith, 79; 9 R. R. 790	50
<i>Hay's Case</i> (1875), L. R. 10 Ch. 593; 44 L. J. Ch. 721; 33 L. T. 466	113
<i>Haycroft, etc., Co., Re</i> , [1900] 2 Ch. 230; 69 L. J. Ch. 497; 83 L. T. 166; 7 Manson, 243	9

	PAGE
<i>Hayes v. Tindall</i> (1861), 1 B. & S. 296; 2 F. & F. 444; 30 L. J. Q. B. 362; 4 L. T. 403; 9 W. R. 664; 124 R. R. 564	78
<i>Hayle, The</i> , [1929] P. 275; 99 L. J. P. 145; 141 L. T. 429; 45 T. L. R. 560	222
<i>Haymes v. Cooper</i> (1864), 33 L. J. Ch. 488; 10 L. T. 87; 12 W. R. 539	153
<i>Haynes v. Foster</i> (1833), 2 C. & M. 237; 4 Tyr. 65; 3 L. J. Ex. 153; 40 R. R. 755...	61
<i>Hayton v. Irwin</i> (1879), 5 C. P. D. 130; 41 L. T. 666; 28 W. R. 665	192
<i>Hazard v. Treadwell</i> (1730), 1 Str. 506	170
<i>Heald v. Kenworthy</i> (1855), 10 Ex. 739; 24 L. J. Ex. 76; 102 R. R. 800	198
<i>Healey v. Storey</i> (1848), 3 Ex. 3; 18 L. J. Ex. 8.....	243
<i>Heap v. Jackson</i> , [1887] W. N. 192.....	151
— <i>v. Motorists' Advisory Agency</i> , [1923] 1 K. B. 577; 92 L. J. K. B. 553; 129 L. T. 146; 39 T. L. R. 150	3, 182
<i>Heard v. Pilley</i> (1869), L. R. 4 Ch. 548; 38 L. J. Ch. 718; 17 W. R. 750; 21 L. T. 68...	30
<i>Heath v. Chilton</i> (1844), 12 M. & W. 632; 13 L. J. Ex. 225; 67 R. R. 447.....	8, 35, 80, 81
— <i>v. Parkinson</i> (1926), 136 L. T. 128; 42 T. L. R. 693	134
<i>Heathorn v. Darling</i> (1836), 1 Moo. P. C. 5	66
<i>Heatley v. Newton</i> (1881), 19 Ch. D. 326; 51 L. J. Ch. 225; 45 L. T. 455; 30 W. R. 72	239
<i>Hedley v. Baunbridge</i> (1842), 3 Q. B. 316; 11 L. J. Q. B. 293; 2 G. & D. 483; 6 Jur. 853; 61 R. R. 239	10
<i>Heinrich, The</i> (1872), L. R. 3 Ad. 505; 41 L. J. Ad. 68; 26 L. T. 372; 20 W. R. 759...	153
<i>Heisch v. Carrington</i> (1833), 11 A. & E. 565, n.; 5 C. & P. 471; 38 R. R. 835, 840...	205
<i>Helder, Ex p.</i> (1883), 24 Ch. D. 339	281
<i>Helyear v. Hawke</i> (1803), 5 Esp. 72	47
<i>Hemings v. Pugh</i> (1863), 4 Giff. 456; 9 L. T. 283; 12 W. R. 44	90
<i>Hemming v. Hale</i> (1859), 7 C. B. 487; 29 L. J. C. P. 137; 6 Jur. 554; 121 R. R. 604...	69
<i>Henderson v. Australian S. N. Co.</i> (1855), 5 E. & B. 409; 24 L. J. Q. B. 322; 103 R. R. 538	31
— <i>v. Barnewell</i> (1827), 1 Y. & J. 387; 30 R. R. 799	61, 70
— <i>v. Martin</i> (1912), 46 Ir. L. T. 13.....	145
— <i>v. Rothschild</i> (1887), 56 L. J. Ch. 471; 56 L. T. 98; 35 W. R. 485; 3 T. L. R. 364	260
— <i>v. Williams</i> , [1895] 1 Q. B. 521; 64 L. J. Q. B. 308; 72 L. T. 98; 43 W. R. 274; 11 T. L. R. 148	16, 83
<i>Henley, Re</i> (1876), 4 Ch. D. 133; 46 L. J. Bk. 20; 25 W. R. 105; 35 L. T. 644 ...	60, 167, 201, 202
— <i>v. Soper</i> (1828), 8 B. & C. 16; 6 L. J. (o.s.) K. B. 210; 2 M. & R. 153.....	51
<i>Henry v. Gregory</i> (1905), 22 T. L. R. 53	126
— <i>v. Lowson</i> (1886), 2 T. L. R. 199	283
<i>Herald v. Connah</i> (1876), 34 L. T. 885	241
<i>Hereford Waggon Co., Re</i> (1876), 2 Ch. D. 621; 45 L. J. Ch. 461; 35 L. T. 40.....	132
<i>Hermione, The</i> , [1922] P. 162; 91 L. J. P. 136; 126 L. T. 701; 38 L. R. 381.....	104
<i>Hern v. Nichols</i> (1701), 1 Salk. 289.....	211
<i>Hersey, The</i> (1837), 3 Hagg. Ad. 404	66
<i>Heaketh, Ex p.</i> (1898), 78 L. T. 368; 46 W. R. 617	95
<i>Heugh v. Abergavenny</i> (1874), 23 W. R. 40	266
<i>Hewett, Re</i> (1893), 9 T. L. R. 166	104, 143
<i>Hewitt v. Bonvin</i> , [1940] 1 K. B. 188; 109 L. J. K. B. 223; 161 L. T. 360; 56 T. L. R. 43	206, 207
— <i>v. Loosemore</i> (1851), 9 Hare 449; 21 L. J. Ch. 69; 89 R. R. 526	225
— <i>v. Spiers & Pond, Ltd.</i> (1896), 13 T. L. R. 64	208
<i>Heyman v. Flewket</i> (1863), 13 C. B. 519; 32 L. J. C. P. 132; 9 Jur. 895; 1 N. R. 479; 134 R. R. 629	2
— <i>v. Neale</i> (1809), 2 Camp. 337	191
<i>Heys v. Tindall. See Hayes v. Tindall.</i>	
<i>Heyworth v. Knight</i> (1864), 17 C. B. 298; 33 L. J. C. P. 298; 10 Jur. 866; 142 R. R. 355.....	167

	PAGE
Hibbert v. Bayley (1860), 2 F. & F. 48	98, 106
Hichens v. Congreve (1831), 4 Sim. 420	95, 96
— Harrison, Woolston & Co. v. Jackson & Sons, [1943] A. C. 266; 112 L. J. K. B. 88; 168 L. T. 128; 59 T. L. R. 112; [1943] 1 All E. R. 128	192, 237
Hich v. Tweedy (1890), 63 L. T. 765; 6 Asp. M. C. 599	243
Hiern v. Mill (1806), 13 Ves. 120; 9 R. R. 149	225
Higgins v. Beauchamp, [1914] 2 K. B. 1192; 84 L. J. K. B. 631; 111 L. T. 1103; 30 T. L. R. 687	10
— v. Hopkins (1848), 3 Ex. 163; 18 L. J. Ex. 113; 77 R. R. 575	16
— v. Senior (1841), 11 L. J. Ex. 199; 8 M. & W. 834; 58 R. R. 884	246
Higgs v. Schrader (1878), 3 C. P. D. 252; 47 L. J. C. P. 426; 26 W. R. 831	152
Hilberry v. Hatton (1864), 2 H. & C. 822; 33 L. J. Ex. 190; 10 L. T. 39; 133 R. R. 811	34, 40, 43
Hill, <i>Ex p.</i> (1862), 32 L. J. Ch. 154; 7 L. T. 656	95
— v. Curtis (1866), 35 L. J. Ch. 133; L. R. 1 Eq. 90; 12 Jur. 4; 13 L. T. 584; 14 W. R. 125; 148 R. R. 100	268
— v. Featherstonhaugh (1831), 7 Bing. 569; 5 M. & P. 541; 33 R. R. 576	134
— v. Kitching (1846), 3 C. B. 299; 15 L. J. C. P. 251; 71 R. R. 355	125
— v. Royds (1869), L. R. 8 Eq. 290; 38 L. J. Ch. 538; 20 L. T. 842	259
— v. Smith (1844), 12 M. & W. 618; 13 L. J. Ex. 243; 67 R. R. 436	112, 150
— v. Tottenham Urban Council (1899), 79 L. T. 495	6
Hillyer v. St. Bartholomew's Hospital, [1909] 2 K. B. 820; 78 L. J. K. B. 958; 101 L. T. 368; 53 S. J. 714; 25 T. L. R. 762	215
Hilo Manufacturing Co. v. Williamson (1911), 28 T. L. R. 164	199, 211
Hilton v. Helliwell, [1894] 2 Ir. R. 94	121
Hinde v. Whitehouse (1806), 7 East, 558; 3 Smith, 528; 8 R. R. 676	5
Hindle v. Brown (1908), 98 L. T. 44, 791	258, 262
Hindley v. Westmeath (1827), 6 B. & C. 200; 9 D. & R. 351; 30 R. R. 290; 5 L. J. (o.s.) K. B. 115	25
Hindson v. Weatherill (1854), 5 D. M. & G. 301; 23 L. J. Ch. 820; 104 R. R. 134	90
Hine v. S. S. Ins. Synd. (1895), 72 L. T. 79; 11 T. L. R. 224	47, 205
Hippisley v. Kneel, [1905] 1 K. B. 1; 74 L. J. K. B. 68; 92 L. T. 20; 21 T. L. R. 5	94, 133
Hirst v. West Riding Banking Co., [1901] 2 K. B. 560; 70 L. J. K. B. 828; 85 L. T. 3; 49 W. R. 715	7, 219
— v. Williams (1895), 12 T. L. R. 128	143
Hitchings v. Thompson (1850), 5 Ex. 50; 19 L. J. Ex. 146; 82 R. R. 560	81
Hobday v. Peters (1860), 28 Beav. 349; 29 L. J. Ch. 780; 8 W. R. 512; 6 Jur. 754; 2 L. T. 590; 126 R. R. 162	93
Hobhouse v. Hamilton (1826), 1 Hog. 401, Ir.	237
Hobler, <i>Re</i> (1844), 8 Beav. 101	63
Hobson v. Jones (1870), L. R. 9 Eq. 456; 39 L. J. Ch. 245; 22 L. T. 143; 18 W. R. 477	12
Hoby v. Buil (1832), 3 B. & Ad. 350; 1 L. J. K. B. 121; 37 R. R. 444	100, 106
Hocker v. Waller (1924), 29 Com. Cas. 296	121
Hodge v. Matlock Bath U.D.C. (1910), 27 T. L. R. 129; 75 J. P. 65; 82 L. G. R. 1127	32
Hodges v. Hackridge Park Residential Hotel, Ltd., [1940] 1 K. B. 404; 109 L. J. K. B. 190; 162 L. T. 74; 56 T. L. R. 128; [1939] 4 All E. R. 347	121
— v. Hodges (1796), 1 Esp. 441; 2 Peake, 79; 4 R. R. 889	27
Hodgkinson v. Fletcher (1814), 4 Camp. 70; 15 R. R. 725	24, 25
— v. Kelly (1868), L. R. 6 Eq. 496; 37 L. J. Ch. 837; 16 W. R. 1078	59, 140, 191
Hodgson v. Anderson (1825), 3 B. & C. 842; 5 D. & Ry. 735	258, 276
Hogarth v. Latham (1878), 3 Q. B. D. 643; 47 L. J. Q. B. 339; 39 L. T. 75; 26 W. R. 388	11
— v. Wherley (1875), L. R. 10 C. P. 630; 44 L. J. C. P. 330; 32 L. T. 800	205
Hogg v. Snaith (1808), 1 Taunt. 347; 9 R. R. 788	50

	PAGE
Hoggard v. Mackenzie (1858), 6 W. R. 572; 25 Beav. 493; 4 Jur. 1008; 119 R. R. 505	148
Holden v. Webber (1860), 29 Beav. 117; 131 R. R. 482	93
Holder v. Cope (1846), 2 C. & K. 437	24
Holderness v. Collinson (1827), 6 L. J. (o.s.) K. B. 17; 7 B. & C. 212; 1 Man. & R. 55; 31 R. R. 174	147
Holding v. Elliott (1860), 5 H. & N. 117; 29 L. J. Ex. 134; 8 W. R. 192; 120 R. R. 504	246, 247
Holdsworth v. Lancs. and Yorks. Ins. Co. (1907), 23 T. L. R. 521	173, 223
Holl v. Griffin (1833), 10 Bing. 246; 3 M. & Scott, 732; 3 L. J. C. P. 17; 38 R. R. 817	83
Holland, <i>Re</i> (1868), L. R. 4 Ch. 168; 19 L. R. 542; 17 W. R. 266	231
— v. Russell (1863), 4 B. & S. 14; 32 L. J. Q. B. 297; 8 L. T. 468; 11 W. R. 757; 129 R. R. 635	257
Holliday v. National Telephone Co., [1899] 2 Q. B. 392; 68 L. J. Q. B. 1016; 81 L. T. 252; 47 W. R. 658	2
Hollington, <i>Ex p.</i> (1873), 43 L. J. Ch. 99; 29 L. T. 502; 22 W. R. 106	63
Hollins v. Fowler (1872), L. R. 7 Q. B. 616; 41 L. J. Q. B. 277; 27 L. T. 168; 20 W. R. 868; affirmed L. R. 7 H. L. 757; 44 L. J. Q. B. 169; 33 L. T. 73	271
Hollis v. Claridge (1813), 4 Taunt. 807; 39 R. R. 662, 663	157
Hollman v. Pullin (1884), 1 C. & E. 254	248
Holman v. Loynes (1854), 4 De G. M. & G. 270; 23 L. J. Ch. 529; 102 R. R. 127 ..	89
Holmes v. Tutton (1855), 5 E. & B. 65; 24 L. J. Q. B. 346; 103 R. R. 367	265
Holt v. Brien (1821), 4 B. & A. 252	22, 43
— v. Ely (1853), 1 E. & B. 795; 93 R. R. 398	266
— v. Markham, [1923] 1 K. B. 504; 92 L. J. K. B. 406; 128 L. T. 718; 67 S. J. 314	141
Home Marine Ins. Co. v. Smith, [1898] 2 Q. B. 351; 67 L. J. Q. B. 777; 78 L. T. 734; 46 W. R. 661; 8 Asp. M. C. 408	144
Honduras Ry. v. Lefevre (1877), 2 Ex. D. 301; 46 L. J. Ex. 391	249
Hood v. Reeve (1828), 3 C. & P. 532	221
Hooley Hill Rubber, etc. Co., <i>Re</i> , [1920] 1 K. B. 257; 89 L. J. K. B. 179; 122 L. T. 173; 36 T. L. R. 81	170
Hooper, <i>Re</i> (1864), 33 L. J. Ch. 300; 9 L. T. 741; 12 W. R. 324; 2 D. J. & S. 91; 10 Jur. 114; 139 R. R. 42	26, 99
— v. Herts, [1906] 1 Ch. 549; 75 L. J. Ch. 253; 94 L. T. 324; 54 W. R. 350; 13 Manson, 85	176, 192
— v. Kerr (1901), 83 L. T. 729	41, 44
— v. Treffrey (1847), 1 Ex. 17; 16 L. J. Ex. 233; 74 R. R. 578	136
Hopcroft v. Parker (1867), 16 L. T. 561	244
Hope, <i>The</i> (1872), 28 L. T. 287	156
— (1883), 8 P. D. 144; 52 L. J. P. 63; 49 L. T. 148; 32 W. R. 269	154
Hope v. Glendinning, [1911] A. C. 419; 80 L. J. P. C. 193	147
Hopkins v. Ware (1869), L. R. 4 Ex. 268; 39 L. J. Ex. 147; 20 L. T. 147	198
Hopkinson v. Forster (1874), L. R. 19 Eq. 74; 23 W. R. 301	260
— v. Smith (1822), 1 Bing. 13; 7 Moo. 237; 25 R. R. 571	99, 133
Hopper v. Conyers (1866), L. R. 2 Eq. 549; 14 W. R. 628	228
Horford v. Wilson (1807), 1 Taunt. 12	125
Horn v. Ivy (1670), 1 Vent. 47	32
Hornby v. Lacy (1817), 6 M. & S. 166; 18 R. R. 345	3, 102, 186, 202
Horne, <i>Re</i> , Horne v. Horne, [1906] 1 Ch. 271; 75 L. J. Ch. 206; 54 W. R. 278	153
Horner v. Walker, [1923] 2 Ch. 218; 92 L. J. Ch. 573; 129 L. T. 782	64
Horsfall v. Fauntleroy (1830), 8 L. J. (o.s.) K. B. 259; 10 B. & C. 755; 5 M. & R. 653	197
Horwood v. Heffer (1811), 3 Taunt. 421	26
Hotel Regina (Torquay), Ltd. v. Moon, [1940] 2 K. B. 69; 109 L. J. K. B. 582; 162 L. T. 359; 56 T. L. R. 627; [1940] 2 All E. R. 495	289

	PAGE
<i>Hough v. Boston</i> (1885), 1 T. L. R. 606	233
— <i>v. Manzanos</i> (1879), 4 Ex. D. 104; 48 L. J. Ex. 398; 27 W. R. 536	243
<i>Houghton v. Matthews</i> (1803), 3 B. & P. 485; 7 R. R. 815	60, 149
— <i>v. Mundy</i> (1910), 103 L. T. 60; 74 J. P. 377; 8 L. G. R. 838	287
— <i>v. Northard</i> , [1928] A. C. 1; 97 L. J. K. B. 76; 138 L. T. 210; 44 T. L. R. 76... ..	222
— <i>v. Pilkington</i> , [1912] 3 K. B. 308; 82 L. J. K. B. 79; 107 L. T. 235; 28 T. L. R. 492	54
<i>Houldsworth v. City of Glasgow Bank</i> (1880), 5 A. C. 317; 42 L. T. 194; 28 W. R. 677	190, 212
<i>Houliston v. Smyth</i> (1825), 3 L. J. (o.s.) C. P. 200; 3 Bing. 127; 10 Moo. 482; 2 C. & P. 22; 28 R. R. 609	25, 26
<i>Houstoun v. Bordenave</i> (1816), 6 Taunt. 451; 2 Marsh. 141; 16 R. R. 657	138, 279
— <i>v. Robertson</i> (1816), 6 Taunt. 448; 2 Marsh. 138; 4 Camp. 342; Holt N. P. 88; 16 R. R. 655	138, 279
<i>Hovenden v. Milhoff</i> (1900), 83 L. T. 41; 16 T. L. R. 506	113, 233
<i>Hovil v. Pack</i> (1806), 7 East, 164; 3 Smith, 164	40
<i>How v. Kirchner</i> (1856), 6 W. R. 198; 11 Moo. P. C. 21; 111 R. R. 10	161
<i>Howard v. Baillie</i> (1796), 2 H. Bl. 618; 3 R. R. 531	49, 50
— <i>v. Braithwaite</i> (1812), 1 Ves. & B. 202	64
— <i>v. Chapman</i> (1831), 4 C. & P. 508; 34 R. R. 814	54
— <i>v. Manx Isles S.S. Co.</i> , [1923] 1 K. B. 110; 92 L. J. K. B. 233; 128 L. T. 347; 38 T. L. R. 757	118, 129
— <i>v. Odhams Press, Ltd.</i> (1937), 106 L. J. K. B. 675; 157 L. T. 191; 81 S. J. 375; 53 T. L. R. 570; [1937] 2 All E. R. 579	107
— <i>v. Patent Ivory Co.</i> (1888), 38 Ch. D. 156; 57 L. J. Ch. 878; 58 L. T. 395; 36 W. R. 801	35, 36
— <i>v. Sheward</i> (1866), L. R. 2 C. P. 148; 36 L. J. C. P. 52	52, 56, 169
— <i>v. Tucker</i> (1831), 9 L. J. (o.s.) K. B. 108; 1 B. & Ad. 712; 35 R. R. 418 ... 144, 170, 219	
<i>Howard's Case</i> (1856), L. R. 1 Ch. 561; 36 L. J. Ch. 42; 14 L. T. 747	70
<i>Howell, Ex p.</i> (1865), 12 L. T. 785	51, 53
— <i>v. Batt</i> (1833), 3 L. J. K. B. 49; 2 N. & M. 381; 5 B. & Ad. 504	260
— <i>v. Young</i> (1826), 4 L. J. (o.s.) K. B. 160; 5 B. & C. 259; 8 D. & R. 14; 2 C. & P. 238; 29 R. R. 237	103
<i>Hubbart v. Phillips</i> (1845), 2 D. & L. 707; 13 M. & W. 702; 14 L. J. Ex. 103; 67 R. R. 797	252
<i>Hubbersty v. Ward</i> (1853), 8 Ex. 330; 22 L. J. Ex. 113; 91 R. R. 519	68
<i>Hudson v. Granger</i> (1821), 5 B. & A. 27; 24 R. R. 268	204, 281
<i>Hughes v. Graeme</i> (1864), 33 L. J. Q. B. 335; 12 W. R. 857; 144 R. R. 747 ... 251, 254	
— <i>v. Liverpool, etc., Soc.</i> , [1916] 2 K. B. 482; 85 L. J. K. B. 1643; 115 L. T. 40; 32 T. L. R. 525	175, 199
— <i>v. Morris</i> (1852), 21 L. J. Ch. 761; 9 Hare, 636; 2 D. M. & G. 349; 16 Jur. 603; 95 R. R. 136	202
— <i>v. Percival</i> (1882), 8 A. C. 443; 51 L. J. Q. B. 388	2
<i>Hull v. Pickersgill</i> (1819), 1 Brod. & B. 282; 3 Moo. 612; 21 R. R. 598	33, 43, 269
<i>Hulse v. Hulse</i> (1856), 17 C. B. 711; 25 L. J. C. P. 177; 104 R. R. 852	119
<i>Hulton, Re</i> (1891), 39 W. R. 303	230
<i>Humble v. Hunter</i> (1848), 12 Q. B. 310; 17 L. J. Q. B. 350; 76 R. R. 291	188
<i>Humfrey v. Dale</i> (1858), E. B. & E. 1004; 27 L. J. Q. B. 390	247
<i>Humphrey v. Lucas</i> (1845), 2 C. & K. 152; 80 R. R. 833	193
<i>Humphreys, Re</i> , [1898] 1 Q. B. 520; 67 L. J. Q. B. 412; 78 L. T. 182; 46 W. R. 322; 5 Manson, 11	152, 157
<i>Hunt v. Chamberlain</i> (1896), 12 T. L. R. 186	139
— <i>v. De Blaquiere</i> (1829), 5 Bing. 550; 3 Moo. & P. 108; 30 R. R. 737; 7 L. J. (o.s.) C. P. 198	20
— <i>v. Elmes</i> (1861), 30 L. J. Ch. 255; 3 L. T. 796; 2 D. F. & J. 578; 7 Jur. 200; 9 W. R. 362; 129 R. R. 204	176

	PAGE
<i>Hunt v. Maniere</i> (1864), 34 L. J. Ch. 142; 13 W. R. 212, 363; 11 L. T. 469, 723; 11 Jur. 28, 73	82
<i>Hunter v. Atkins</i> (1832), 3 Myl. & K. 113; 41 R. R. 30	90
— <i>v. Belcher</i> (1864), 2 De G. J. & S. 194	91
— <i>v. Caldwell</i> (1847), 10 Q. B. 69, 83; 16 L. J. Q. B. 274; 74 R. R. 203	109
— <i>v. Parker</i> (1840), 7 M. & W. 322; 10 L. J. Ex. 281; 56 R. R. 723	39, 41, 67
<i>Huntley v. Bulwer</i> (1839), 8 Scott, 325; 6 Bing. N. C. 111; 54 R. R. 747; 3 Jur. 1105	135
<i>Huntsman, The</i> , [1894] P. 214; 70 L. T. 386	53, 196
<i>Hurley v. Baker</i> (1846), 16 M. & W. 26	257
<i>Hurlstone v. London Electric Ry.</i> (1914), 30 T. L. R. 398	2
<i>Hurrell v. Bullard</i> (1862), 3 F. & F. 445	74
<i>Hurry v. Rickman</i> (1831), 1 M. & Rob. 126	207
<i>Hurst v. Holding</i> (1810), 3 Taunt. 32; 12 R. R. 587	132
<i>Husband v. Davis</i> (1851), 10 C. B. 645; 20 L. J. C. P. 118; 2 L. M. & P. 50; 84 R. R. 739	8
<i>Hussey v. Christie</i> (1807), 13 Ves. 599; 9 East, 426; 9 R. R. 585	66
<i>Hutcheson v. Eaton</i> (1884), 13 Q. B. D. 861; 51 L. T. 846	244
<i>Hutchins v. Hutchins</i> (1825), 1 Hog. 315; 34 R. R. 234	100
— <i>v. L. C. C.</i> (1915), 85 L. J. K. B. 1177; 114 L. T. 377; 32 T. L. R. 179	216
<i>Hutchinson v. Heyworth</i> (1838), 9 A. & E. 375; 1 P. & D. 266; 8 L. J. Q. B. 17; 48 R. R. 530	278
— <i>v. Newark</i> (1850), 3 De G. & Sm. 727; 84 R. R. 415	100
— <i>v. Tatham</i> (1873), L. R. 8 C. P. 482; 42 L. J. C. P. 260; 29 L. T. 103; 22 W. R. 18	246
<i>Hutchison v. Colorado Mining Co.</i> (1887), 3 T. L. R. 265	227
<i>Huth, Ex p.</i> (1840), Mont. & Ch. 667; 4 Dea. 294	85, 98, 233
<i>Hutton v. Bulloch</i> (1874), L. R. 9 Q. B. 572; 30 L. T. 648; 22 W. R. 956	57, 188, 236
— <i>v. Secretary of State for War</i> (1926), 43 T. L. R. 106	267
— <i>v. Thompson</i> (1851), 3 H. L. C. 161	16
<i>IDA, THE</i> (1872), L. R. 3 Ad. 542	66
— (1875), 32 L. T. 541	219
<i>Idle v. Royal Exchange Ass.</i> (1819), 3 Moo. 115; 8 Taunt. 755; 21 R. R. 538	67
<i>Imperial Bank v. London and St. Katharine's Docks Co.</i> (1876), 5 Ch. D. 195; 46 L. J. Ch. 335; 36 L. T. 233	164, 247
<i>Imperial Mercantile Credit Co. v. Coleman</i> (1873), L. R. 6 H. L. 189; 42 L. J. Ch. 644; 29 L. T. 1	88, 92
<i>Imperial Wine Co., Re</i> (1872), L. R. 14 Eq. 417; 42 L. J. Ch. 5	130
<i>Importers Co. v. Westminster Bank</i> , [1927] 2 K. B. 297; 96 L. J. K. B. 919; 137 L. T. 693; 43 T. L. R. 639	271
<i>Inchbald v. Western Neilgherry, etc. Co.</i> (1864), 17 C. B. 733; 34 L. J. C. P. 15; 10 Jur. 1229; 11 L. T. 345; 13 W. R. 95; 142 R. R. 603	129
<i>Inchmaree, The</i> , [1899] P. 111; 68 L. J. P. 30; 80 L. T. 201; 8 Asp. M. C. 486	66
<i>Inglis v. Robertson</i> , [1898] A. C. 616; 67 L. J. P. C. 108; 79 L. T. 224	180
<i>Ingram v. Ingram</i> (1740), 2 Atk. 88	7
— <i>v. Little</i> (1883), 1 C. & E. 186	28
<i>Innes v. Stephenson</i> (1831), 1 M. & Rob. 145	8, 80
<i>International Contract Co., Re Pickering's Claim</i> (1871), L. R. 6 Ch. 525; 24 L. T. 178	189
<i>International Soc. of Auctioneers, Re</i> , [1898] 1 Ch. 110; 67 L. J. Ch. 81; 77 L. T. 523; 46 W. R. 187; 4 Manson, 393	199
<i>International Sponge Importers v. Watt</i> , [1911] A. C. 279; 81 L. J. P. C. 12; 27 T. L. R. 364	54, 205
<i>Ireland v. Livingston</i> (1872), L. R. 5 H. L. 395; 41 L. J. Q. B. 201; 27 L. T. 79	48
— <i>v. Thomson</i> (1847), 4 C. B. 149; 17 L. J. C. P. 241; 72 R. R. 560	67

<i>Ireson v. Pearman</i> (1825), 3 B. & C. 799; 5 D. & R. 687; 3 L. J. (o.s.) K. B. 119; 27 R. R. 490	108
<i>Irvine v. Union Bank of Australia</i> (1877), 2 App. Cas. 366; 46 L. J. P. C. 87; 37 L. T. 176; 25 W. R. 682	34, 43
— <i>v. Watson</i> (1880), 5 Q. B. D. 102, 414; 49 L. J. Q. B. 239, 531; 42 L. T. 51, 800	198, 199
<i>Irving v. Motly</i> (1831), 9 L. J. (o.s.) C. P. 161; 7 Bing. 543; 5 M. & P. 380	43
<i>Iveson v. Conington</i> (1823), 1 L. J. (o.s.) K. B. 71; 1 B. & C. 160; 2 D. & R. 307; 25 R. R. 344	244
<i>JACKSON v. Smith</i> (1884), 53 L. J. Ch. 972; 51 L. T. 72	154
<i>Jacobs v. Latour</i> (1828), 6 L. J. (o.s.) C. P. 243; 5 Bing. 130; 2 M. & P. 201	162
— <i>v. Morris</i> , [1902] 1 Ch. 816; 71 L. J. Ch. 363; 86 L. T. 275; 50 W. R. 371	50, 184
<i>James, Ex p.</i> (1803), 8 Ves. 337; 7 R. R. 56	85
—, <i>Ex p.</i> (1883), 49 L. T. 530	116
— <i>v. Ricknell</i> (1887), 20 Q. B. D. 164; 57 L. J. Q. B. 113; 58 L. T. 278; 4 T. L. R. 169	64
— <i>v. Smith</i> , [1891] 1 Ch. 384; 65 L. T. 544	86
— <i>v.</i> — (1921), [1931] 2 K. B. 317, n.; 100 L. J. K. B. 585, n.; 145 L. T. 457, n.	125
<i>James Seddon, The</i> (1866), L. R. 1 Ad. 62; 35 L. J. Ad. 117	136
<i>Jameson v. Union Bank of Scotland</i> (1913), 109 L. T. 850	176
<i>Janesich v. Attenborough</i> (1910), 102 L. T. 605; 26 T. L. R. 278	182
<i>Jardine v. Leathley</i> (1863), 3 B. & S. 700; 32 L. J. Q. B. 132; 7 L. T. 783; 11 W. R. 432; 9 Jur. 1035; 129 R. R. 525	13, 38
<i>Jarman v. Hooper</i> (1843), 13 L. J. C. P. 63; 1 D. & L. 769; 6 M. & G. 827; 64 R. R. 861; 7 Scott. 663; 8 Jur. 127	63, 208
<i>Jasperson v. Dominion Tobacco Co.</i> , [1923] A. C. 709; 62 L. J. P. C. 190; 129 L. T. 771	232
<i>Jebara v. Ottoman Bank</i> , [1927] 2 K. B. 254; 96 L. J. K. B. 581; 137 L. T. 101; 32 Com. Cas. 228; 43 T. L. R. 369; 27 Ll. L. R. 294; reversed, [1928] A. C. 269; 97 L. J. K. B. 502; 139 L. T. 194; 33 Com. Cas. 260; 72 S. J. 516; 44 T. L. R. 525; 31 Ll. L. R. 37	15, 275
<i>Jefferson v. Derbyshire Farmers</i> , [1921] 2 K. B. 281; 90 L. J. K. B. 1361; 124 L. T. 775	210
<i>Jeffrey v. Crawford</i> (1890), 7 T. L. R. 618	120
<i>Jeffreys v. Agra Bank</i> (1866), L. R. 2 Eq. 674; 35 L. J. Ch. 686; 14 W. R. 889	159
<i>Jenkins v. Betham</i> (1855), 15 C. B. 168; 24 L. J. C. P. 94; 100 R. R. 297	79
— <i>v. Gould</i> (1827), 3 Russ. 385	49, 77
— <i>v. Hutchinson</i> (1849), 13 Q. B. 744; 18 L. J. Q. B. 274; 78 R. R. 500	240, 248
— <i>v. Morris</i> (1847), 16 M. & W. 877	190
<i>Jenkinson, Re</i> (1885), 15 Q. B. D. 441; 54 L. J. Q. B. 601	228
<i>Jenkyns v. Brown</i> (1849), 14 Q. B. 496; 19 L. J. Q. B. 286; 80 R. R. 287	164
<i>Jenner v. Morris</i> (1861), 30 L. J. Ch. 361; 3 D. F. & J. 45; 7 Jur. 375; 3 L. T. 871; 9 W. R. 391; 130 R. R. 22	25, 155
<i>Jennings v. Moore</i> (1708), 2 Vern. 609	43
<i>Jenny Lind, The</i> (1872), L. R. 3 Ad. 529; 41 L. J. Ad. 63; 26 L. T. 591	156
<i>Jessel v. Bath</i> (1867), L. R. 2 Ex. 267; 36 L. J. Ex. 149; 15 W. R. 1041	68
<i>Jetley v. Hill</i> (1884), 1 C. & E. 239	17, 21
<i>Jewan v. Whitworth</i> (1866), L. R. 2 Eq. 692; 36 L. J. Ch. 127	179
<i>Jewitt, Re</i> (1864), 34 Beav. 22	151
<i>Jewry v. Busk</i> (1814), 5 Taunt. 302	119
<i>Jewsbury v. Newbold</i> (1857), 26 L. J. Ex. 247; 112 R. R. 927; 29 L. T. 128	20, 21, 28
<i>Joel v. Morison</i> (1834), 6 C. & P. 501; 40 R. R. 814	211
<i>Johns v. Simons</i> (1842), 2 Q. B. 425; 57 R. R. 714	66
<i>Johnson, Re</i> (1881), 7 Q. B. D. 155; 8 Q. B. D. 262; 51 L. J. Q. B. 108; 45 L. T. 578	73, 161

	PAGE
Johnson v. Emerson (1871), L. R. 6 Ex. 329; 40 L. J. Ex. 201; 25 L. T. 337.....	268
— v. Kearley, [1908] 2 K. B. 514; 77 L. J. K. B. 904; 99 L. T. 506; 24 T. L. R. 729	98, 145
— v. Lindsay (1889), 53 J. P. 599	220
— v. Marriott (1833), 2 C. & M. 183; 2 Dowl. 343; 4 Tyr. 78; 3 L. J. Ex. 40; 39 R. R. 740	100
— v. Ogilby (1734), 3 P. W. 277	237, 247
— v. Robarts (1875), L. R. 10 Ch. 505; 44 L. J. Ch. 678; 33 L. T. 138; 23 W. R. 763	159, 259
Johnston v. Braham, [1917] 1 K. B. 586; 86 L. J. K. B. 613; 116 L. T. 188	110
— v. Kershaw (1867), L. R. 2 Ex. 82; 36 L. J. Ex. 44; 15 L. T. 485; 15 W. R. 354... ..	48
— v. Sumner (1858), 3 H. & N. 261; 27 L. J. Ex. 341; 117 R. R. 679; 4 Jur. 462; 6 W. R. 574.....	22, 24, 25, 26
— v. Usborne (1841), 11 A. & E. 549; 3 P. & D. 236; 52 R. R. 445.....	139
Johnston's Claim (1870), L. R. 6 Ch. 212; 40 L. J. Ch. 286; 24 L. T. 115; 19 W. R. 457	107, 110
Johnstone v. Pedlar, [1921] A. C. 262; 90 L. J. P. C. 181; 125 L. T. 809; 37 T. L. R. 870	267
Jolliffe v. Woodhouse (1894), 10 T. L. R. 553.....	2
Jolly v. Rees (1864), 15 C. B. 628; 33 L. J. C. P. 177; 10 Jur. 319; 10 L. T. 299; 12 W. R. 473; 137 R. R. 688	20, 21
Jombart v. Woollett (1837), 2 Myl. & C. 389; 6 L. J. Ch. 211; 45 R. R. 101	230
Jones and Roberts, <i>Re</i> , [1905] 2 Ch. 219; 74 L. J. Ch. 458; 92 L. T. 562; 54 W. R. 22... ..	161
Jones v. Bonner (1848), 2 Ex. 230; 76 R. R. 586	154
— v. Cuthbertson (1873), L. R. 8 Q. B. 504; 42 L. J. Q. B. 221; 28 L. T. 673; 21 W. R. 919	8, 80
— v. Gordon (1877), 2 App. Cas. 616; 37 L. T. 477; 26 W. R. 172	177
— v. Hope (1880), 3 T. L. R. 247, n.	249, 252
— v. Hughes (1850), 5 Ex. 104; 19 L. J. Ex. 200; 82 R. R. 594.....	220
— v. Jackson (1870), 22 L. T. 828	242
— v. Littledale (1837), 1 N. & P. 677; 6 A. & E. 486; 6 L. J. K. B. 169; 45 R. R. 542	248, 247
— v. Moffet (1846), 3 J. & L. 636	91
— v. Peppercorne (1858), Johns. 430; 28 L. J. Ch. 158; 5 Jur. 149; 7 W. R. 103; 123 R. R. 177	147, 150, 158
— v. Phipps (1868), L. R. 3 Q. B. 567; 37 L. J. Q. B. 198; 9 B. & S. 761; 18 L. T. 813	53
— v. Scullard, [1898] 2 Q. B. 565; 67 L. J. Q. B. 895; 79 L. T. 386; 14 T. L. R. 580; 47 W. R. 303	213
— v. Thomas (1837), 2 Y. & C. 498; 47 R. R. 449	87
— v. Victoria Graving Dock (1877), 46 L. J. Q. B. 219; 2 Q. B. D. 314; 36 L. T. 347; 25 W. R. 501	30
Jonmenjoy Coondoo v. Watson (1884), 9 App. Cas. 561; 53 L. J. P. C. 80; 50 L. T. 411	49, 50
Jordan v. Norton (1838), 7 L. J. Ex. 281; 4 M. & W. 155; 1 H. & H. 234; 51 R. R. 508	184
Jordeson v. London Hardwood Co. (1914), 110 L. T. 666; 19 Com. Cas. 161.....	262
Joseph v. Knox (1813), 3 Camp. 320; 53 R. R. 250	67, 261
Josephs v. Pebrer (1825), 3 L. J. (o.s.) K. B. 102; 3 B. & C. 639; 1 C. & P. 341; 5 D. & R. 542	131, 142
Jourdaine v. Le Fevre (1793), 1 Esp. 66	147
Joynson v. Hunt (1905), 93 L. T. 470; 21 T. L. R. 692	283
Jubilee Cotton Mills v. Lewis, [1924] A. C. 958; 93 L. J. Ch. 414; 131 L. T. 579; 40 T. L. R. 621	95
Kahl v. Jansen (1812), 4 Taunt. 565	219
Kaltenbach v. Lewis (1885), 10 App. Cas. 617; 55 L. J. Ch. 58; 53 L. T. 787; 34 W. R. 477	204

	PAGE
<i>Karnak, The</i> (1869), L. R. 2 P. C. 505; 38 L. J. Ad. 57; 21 L. T. 159; 6 Moo. P. C. 136	65
<i>Kaye v. Brett</i> (1850), 5 Ex. 289; 19 L. J. Ex. 346; 82 R. R. 659	202
— <i>v. Croydon Tram. Co.</i> , [1898] 1 Ch. 358; 67 L. J. Ch. 222; 78 L. T. 237; 46 W. R. 405	95
<i>Keane, Re</i> (1871), L. R. 12 Eq. 115; 40 L. J. Ch. 617; 24 L. T. 780; 19 W. R. 1025	154
— <i>v. Roberts</i> (1819), 4 Madd. 332; 20 R. R. 306	273
<i>Keay v. Fenwick</i> (1876), 1 C. P. D. 745	40, 44, 132
<i>Keeling v. Pearl Ass. Co.</i> (1923), 129 L. T. 573	174, 223
<i>Keen v. Mear</i> , [1920] 2 Ch. 574; 89 L. J. Ch. 513	57, 78, 173
<i>Keighley v. Durant</i> , [1901] A. C. 240; 70 L. J. K. B. 662; 84 L. T. 777; 17 T. L. R. 527	35
<i>Kell v. Nainby</i> (1829), 8 L. J. (o.s.) K. B. 99; 10 B. & C. 20; 5 M. & R. 76	186
<i>Kelly, Ex p.</i> (1879), 11 Ch. D. 306; 48 L. J. Bk. 65; 40 L. T. 404; 27 W. R. 830	228
<i>Kelly's Directories v. Gavin</i> , [1902] 1 Ch. 631; 71 L. J. Ch. 405; 86 L. T. 393; 50 W. R. 385	268
<i>Kelner v. Baxter</i> (1866), L. R. 2 C. P. 174; 36 L. J. C. P. 94; 15 L. T. 213; 15 W. R. 278	35, 248
<i>Kemeys v. Proctor</i> (1820), 1 Jac. & W. 350; 3 Pes. & B. 57	62
<i>Kemp v. Burt</i> (1833), 4 B. & Ad. 424; 1 N. & M. 262; 2 L. J. K. B. 69; 38 R. R. 278	108
— <i>v. Pryor</i> (1812), 7 Ves. 237	14
<i>Kempshall v. Holland</i> (1895), 14 R. 336	63
<i>Kempson v. Boyle</i> (1865), 3 H. & C. 763; 34 L. J. Ex. 191; 11 Jur. 832; 14 W. R. 15; 140 R. R. 725	191
<i>Kendal v. Wood</i> (1870), L. R. 6 Ex. 243; 39 L. J. Ex. 167	172
<i>Kendall v. Hamilton</i> (1879), 4 App. Cas. 504; 48 L. J. C. P. 705; 41 L. T. 418; 28 W. R. 97	195
<i>Kennedy v. Broun</i> (1864), 13 C. B. 677; 32 L. J. C. P. 137; 9 Jur. 119; 11 W. R. 284; 7 L. T. 626; 134 R. R. 696	119
— <i>v. Gouveia</i> (1823), 3 D. & R. 503; 26 R. R. 616	245
— <i>v. Green</i> (1834), 3 Myl. & K. 699; 41 R. R. 176	224
<i>Kenny v. Cosgrave</i> , [1926] Ir. R. 517	234
<i>Kensington v. Inglis</i> (1807), 8 East, 273; 9 R. R. 438	261
<i>Kent v. Thomas</i> (1856), 1 H. & N. 473; 108 R. R. 677	64
<i>Kenworthy v. Schofield</i> (1824), 2 L. J. (o.s.) K. B. 175; 2 B. & C. 945; 4 D. & R. 566; 26 R. R. 600	70
<i>Keptigalla Rubber Estates v. National Bank of India</i> , [1909] 2 K. B. 1010; 78 L. J. K. B. 964; 100 L. T. 516; 25 T. L. R. 402; 14 Com. Cas. 116	145
<i>Keppel v. Wheeler</i> , [1927] 1 K. B. 577; 96 L. J. K. B. 433; 136 L. T. 203	76, 112, 134
<i>Kettle v. Dunster</i> (1927), 43 T. L. R. 770	242
<i>Kidd v. Horne</i> (1885), 2 T. L. R. 141	104
<i>Kidderminster v. Hardwicke</i> (1873), L. R. 9 Ex. 13; 43 L. J. Ex. 9; 29 L. T. 612; 22 W. R. 160	31, 43
<i>Kiddill v. Farnell</i> (1857), 3 Sm. & G. 428; 26 L. J. Ch. 818; 107 R. R. 146	277
<i>Kidson v. Dilworth</i> (1818), 5 Price 564; 19 R. R. 656	103, 246
<i>Kilgour v. Finlyson</i> (1789), 1 H. Bl. 156	47, 174
<i>Kimber v. Barber</i> (1872), L. R. 8 Ch. 56; 27 L. T. 526; 21 W. R. 65	94
<i>Kimber Coal Co. v. Stone</i> , [1926] A. C. 414; 95 L. J. K. B. 601; 135 L. T. 161; 42 T. L. R. 430	246
<i>Kinahan v. Parry</i> , [1911] 1 K. B. 459; 80 L. J. K. B. 276; 103 L. T. 867	53, 170, 173
<i>King v. Anderson</i> (1874), 8 Ir. R. Eq. 147	88
— <i>v. Howell</i> (1910), 27 T. L. R. 114	84
— <i>v. Hutton</i> , [1900] 2 Q. B. 504; 69 L. J. Q. B. 786; 83 L. T. 68; 48 W. R. 95; 7 Manson, 393	228
— <i>v. Leith</i> (1787), 2 T. R. 141	281
— <i>v. Rossett</i> (1827), 2 Y. & J. 33	91

	PAGE
King v. Smith, [1900] 2 Ch. 425; 69 L. J. Ch. 598; 82 L. T. 815.....	15, 176
Kingston, <i>Ex p.</i> (1871), L. R. 6 Ch. 632; 40 L. J. Bk. 91; 25 L. T. 250; 19 W. R. 910	159, 273
Kinloch v. Craig (1790), 3 T. R. 119, 783; 4 Bro. P. C. 47; 1 R. R. 664	148
— v. Secretary of State for India (1882), 7 A. C. 619; 51 L. J. Ch. 885; 47 L. T. 133; 30 W. R. 845	261
Kirchner v. Gruban, [1909] 1 Ch. 413; 78 L. J. Ch. 117; 99 L. T. 932	19, 90
— v. Venus (1859), 12 Moo. P. C. 361; 7 W. R. 455; 5 Jur. 395; 124 R. R. 95...155, 191	
Kirk v. Bell (1850), 16 Q. B. 290; 83 R. R. 456	9
— v. Evans (1890), 6 T. L. R. 9	118
Kirkham v. Peel (1881), 44 L. T. 195; 43 L. T. 171; 28 W. R. 941	94
Kirkstall Brewery v. Furness Ry. (1874), L. R. 9 Q. B. 468; 43 L. J. Q. B. 142; 30 L. T. 783; 22 W. R. 876	220
Kirton v. Braithwaite (1836), 1 M. & W. 310; 2 Gale, 48	169
Kleinwort v. Associated Automatic Machine Corpn. (1934), 151 L. T. 1; 39 Com. Cas. 189; 78 S. J. 153; 50 T. L. R. 244	172
— v. Cassa Marittima de Genoa (1877), 2 A. C. 156; 36 L. T. 118; 25 W. R. 608... 66	
— v. Comptoir Nat. d'Escompte, [1894] 2 Q. B. 157; 63 L. J. Q. B. 674; 10 T. L. R. 424	271
— v. Dunlop Rubber Co. (1907), 97 L. T. 263; 23 T. L. R. 696	257
Knatchbull v. Hallett (1880), 13 Ch. D. 696; 49 L. J. Ch. 415; 42 L. T. 421; 28 W. T. 732	228
Knight, <i>Re</i> , Knight v. Gardner, [1892] 2 Ch. 368; 61 L. J. Ch. 399; 66 L. T. 646; 40 W. R. 460	153
— v. Faith (1850), 15 Q. B. 649; 19 L. J. Q. B. 509; 81 R. R. 725.....	67
— v. Fitch (1855), 15 C. B. 566; 3 C. L. R. 567; 24 L. J. C. P. 122; 1 Jur. 526; 100 R. R. 497	132
— v. Gordon (1923), 39 T. L. R. 399	126
— v. Lee, [1893] 1 Q. B. 41; 62 L. J. Q. B. 28; 67 L. T. 688; 41 W. R. 125.....	143
— v. North Met. Tram. Co. (1898), 78 L. T. 227	55, 216
Konwles v. Haughton (1805), 11 Ves. 168	91
Knox v. Bushell (1857), 3 C. B. 334; 111 R. R. 676	20
König v. Brandt (1901), 84 L. T. 748; 9 Asp. M. C. 199	160
Königsblatt v. Sweet, [1923] 2 Ch. 314; 39 T. L. R. 576; 92 L. J. Ch. 598	43
Koster v. Eason (1813), 2 M. & S. 112; 14 R. R. 603	138
Kreditbank Cassell v. Schenkers, [1927] 1 K. B. 826; 96 L. J. K. B. 501; 136 L. T. 716; 43 T. L. R. 237	53
Kruger v. Wilcox (1754), Amb. 252; Dick, 269	162
Kullberg, <i>Re</i> (1863), 9 L. T. 460	229
Kymer v. Suwercropp (1807), 1 Camp. 109; 10 R. R. 646	198
Kynaston v. Crouch (1845), 14 M. & W. 266; 14 L. J. Ex. 324	281
LA BOURGOYNE, [1899] A. C. 431; 68 L. J. P. 104; 80 L. T. 845; 8 Asp. M. C. 550 ... 6	
Lacave v. Crédit Lyonnais, [1897] 1 Q. B. 148; 66 L. J. Q. B. 266; 75 L. T. 514; 13 T. L. R. 60	271
Lacey v. Hill, Crowley's Claim (1870), L. R. 18 Eq. 182; 43 L. J. Ch. 561; 30 L. T. 484; 22 W. R. 586	136, 140
— v. —, Scrimgeour's Claim (1870), L. R. 8 Ch. 921; 42 L. J. Ch. 657	140
Ladbroke v. Lee (1850), 4 De G. & S. 106; 87 R. R. 306	161
— v. Todd (1914), 111 L. T. 43; 30 T. L. R. 433; 19 Com. Cas. 256	272
Ladd v. Lynn (1837), 2 M. & W. 265	20
Lady Forrest Gold Mine, <i>Re</i> , [1901] 1 Ch. 582; 70 L. J. Ch. 275; 84 L. T. 559; 8 Manson, 438.....	95, 96
Ladywell Mining Co. v. Brookes (1887), 35 Ch. D. 400; 56 L. J. Ch. 684; 56 L. T. 677; 35 W. R. 785; 3 T. L. R. 546	96
— v. Huggons, <i>Ibid.</i>	96

	PAGE
<i>Lagunas Nitrate Co. v. Lagunas Syndicate</i> , [1899] 2 Ch. 392; 68 L. J. Ch. 699; 81 L. T. 334; 48 W. R. 74; 7 <i>Manson</i> , 165.....	86, 95, 107
<i>Laidler v. Elliott</i> (1825), 3 L. J. (o.s.) K. B. 96; 3 B. & C. 738; 5 D. & R. 635	108
<i>Lake v. Argyll</i> (1844), 6 Q. B. 477; 14 L. J. Q. B. 73	16
— <i>v. Simmons</i> , [1927] A. C. 487; W. C. & I. Rep. 417; 33 Com. Cas. 416; 137 L. T. 233; 43 T. L. R. 417	182
<i>Lakeman v. Mountstephen</i> (1874), L. R. 7 H. L. 17; 43 L. J. Q. B. 188	247
<i>Lamb, Re</i> (1897), 55 L. T. 817	281
— <i>v. Attenborough</i> (1862), 1 B. & S. 831; 31 L. J. Q. B. 41; 10 W. R. 211	2, 181
— <i>v. Evans</i> , [1893] 1 Ch. 218; 62 L. J. Ch. 404; 68 L. T. 131; 41 W. R. 405	90
— <i>v. Goring Brick Co.</i> , [1932] 1 K. B. 710; 101 L. J. K. B. 214; 146 L. T. 318; 48 T. L. R. 160	3, 130
— <i>v. Palk</i> (1840), 9 C. & P. 629	208
<i>Lambert v. G. E. Ry.</i> , [1909] 2 K. B. 776; 79 L. J. K. B. 32; 101 L. T. 408; 73 J. P. 445; 25 T. L. R. 734	216
— <i>v. Heath</i> (1846), 15 M. & W. 486; 71 R. R. 738.....	78, 103
<i>Lamont v. Hamilton</i> , [1907] S. C. 628, Sc.	197
<i>Lamphier v. Phipps</i> (1838), 8 C. & P. 475	79
<i>Land Credit Co., Re</i> (1869), L. R. 4 Ch. 460; 39 L. J. Ch. 27	171
— <i>v. Fermoy</i> (1870), L. R. 5 Ch. 763; 23 L. T. 439; 18 W. R. 1089	110
<i>Landes v. Marcus</i> (1909), 25 T. L. R. 478	241
<i>Lands Allotment Co. v. Broad</i> (1895), 2 <i>Manson</i> , 470; 13 R. 699.....	233
<i>Lane v. Ironmonger</i> (1844), 13 M. & W. 368; 14 L. J. Ex. 35; 67 R. R. 647.....	21
<i>Lang v. Smyth</i> (1831), 7 Bing. 284; 5 M. & P. 78; 9 L. J. (o.s.) C. P. 91; 33 R. R. 462	227
<i>Langen v. G. W. Ry.</i> (1874), 30 L. T. 173; 26 L. T. 577	53
<i>Langhorn v. Allnutt</i> (1812), 4 Taunt. 511; 13 R. R. 663	222
<i>Langridge v. Lynch</i> (1876), 34 L. T. 695	239
<i>Langston v. Corney</i> (1815), 4 Camp. 176	259
<i>Langstroth v. Toulmin</i> (1822), 3 Stark. 145	266
<i>Langton v. Waite</i> (1868), L. R. 6 Eq. 165; 37 L. J. Ch. 345; 18 L. T. 81; 16 W. R. 508	193
<i>Lara v. Hill</i> (1863), 15 C. B. 45; 137 R. R. 377	125
<i>Lascelles v. Rathburn</i> (1919), 63 S. J. 410; 35 T. L. R. 347	19
<i>Last v. Dinn</i> (1859), 28 L. J. Ex. 94	81
<i>Laughland v. Millar</i> (1904), 6 F. 413	266
<i>Law v. Wilkins</i> (1837), 1 N. & P. 697; 6 A. & E. 718	29
<i>Lawford v. Billericay R. Co.</i> , [1903] 1 K. B. 772; 72 L. J. K. B. 554; 88 L. T. 317; 51 W. R. 630; 67 J. P. 245; 1 L. G. R. 535	32
— <i>v. Harris</i> (1896), 12 T. L. R. 275	275
<i>Lawrance, Re</i> , [1894] 1 Ch. 556; 63 L. J. Ch. 205	162
— <i>v. Galaworthy</i> (1857), 3 Jur. 1049; 108 R. R. 953	85
<i>Lawrence v. Fletcher</i> (1874), 12 Ch. D. 858; 27 W. R. 937	161
<i>Laycock v. Grayson</i> (1939), 55 T. L. R. 698	207
<i>Lazarus v. Cairn Line</i> (1912), 106 L. T. 378; 28 T. L. R. 244; 17 Com. Cas. 107	128
<i>Leadbitter v. Farrow</i> (1816), 5 M. & S. 345; 17 R. R. 345.....	242
<i>Leader, The</i> (1868), L. R. 2 Ad. 314; 18 L. T. 767	154
<i>Leahey v. Bracken</i> , [1894] 1 Q. B. 114; 63 L. J. Q. B. 96; 69 L. T. 668; 10 T. L. R. 61	131
— <i>v. Robinson</i> (1844), 12 M. & W. 745; 13 L. J. Ex. 213; 67 R. R. 470	180
<i>Leckenby v. Woolman</i> , [1921] W. N. 100	57
<i>Lee, Re</i> (1868), L. R. 4 Ch. 43	76, 133
— <i>v. Bayes</i> (1856), 18 C. B. 599; 25 L. J. C. P. 249; 107 R. R. 424	272
— <i>v. Bullen</i> (1858), 8 E. & B. 692, n.; 27 L. J. Q. B. 161	102, 138
— <i>v. Everest</i> (1857), 2 H. & N. 285; 26 L. J. Ex. 334; 115 R. R. 536; 29 L. T. 263; 5 W. R. 759	239
— <i>v. Munn</i> (1817), 1 Moo. 481; 8 Taunt. 45; 19 R. R. 452	257

	PAGE
<i>Lee v. Robinson</i> (1856), 18 C. B. 599; 25 L. J. C. P. 249.....	272
— <i>v. Rumilly</i> (1891), 55 J. P. 519; 7 T. L. R. 303	208
— <i>v. Sankey</i> (1872), L. R. 15 Eq. 204; 27 L. T. 809; 21 W. R. 286	8, 80
— <i>v. Walker</i> (1872), L. R. 7 C. P. 121; 41 L. J. C. P. 91; 26 L. T. 70	79
<i>Leeds Banking Co., Re</i> (1866), L. R. 1 Ch. 561; 36 L. J. Ch. 42; 14 L. T. 747	70
<i>Leeds Estate Co. v. Shepherd</i> (1887), 36 Ch. D. 787; 57 L. J. Ch. 46; 57 L. T. 684; 36 W. R. 322	105
<i>Leeds Theatre of Varieties, Re</i> , [1902] 2 Ch. 809; 72 L. J. Ch. 1; 87 L. T. 488; 51 W. R. 5; 10 Manson, 72	95, 96
<i>Lees v. Nuttall</i> (1834), 2 Myl. & K. 819; 1 R. & M. 53; Tamlyn, 282; 31 R. R. 99...	86
<i>Leete v. Leete</i> (1879), 48 L. J. P. 61; 40 L. T. 788; 27 W. R. 921	151
<i>Le Feuvre v. Lloyd</i> (1814), 1 Marsh. 318; 5 Taunt. 749; 15 R. R. 644	103
<i>Legge v. Byas</i> (1902), 7 Com. Cas. 16	47
<i>Leggott & Son v. Normanton & Son</i> (1928), 98 L. J. K. B. 145; 140 L. T. 224; 45 T. L. R. 155	213
<i>Leicester Permanent Building Soc. v. Butt</i> , [1943] Ch. 308; 112 L. J. Ch. 289; 169 L. T. 261; 59 T. L. R. 361; [1943] 2 All E. R. 523.....	12
<i>Leicestershire C. C. v. Michael Faraday and Partners</i> , [1941] 2 K. B. 205; 110 L. J. K. B. 511; 57 T. L. R. 572; [1941] 2 All E. R. 483.....	77
<i>Le Lievre v. Gould</i> , [1893] 1 Q. B. 491; 62 L. J. Q. B. 353; 68 L. T. 626; 41 W. R. 468	77
<i>Lemaitre v. Davis</i> (1881), 19 Ch. D. 281	2
<i>Le Neve v. Le Neve</i> (1747), Ambl. 436; 3 Atk. 646; 1 Ves. 64	224
<i>Lennard v. Robinson</i> (1855), 5 E. & B. 125; 24 L. J. Q. B. 275; 103 R. R. 402	246
<i>Lepard v. Vernon</i> (1813), 2 V. & B. 51; 13 R. R. 13	276
<i>Levi v. Abbott</i> (1849), 4 Ex. 588; 19 L. J. Ex. 62; 80 R. R. 706; 7 D. & L. 185; 14 L. T. 353	63
<i>Levita's Case</i> (1870), L. R. 5 Ch. 589; 39 L. J. Ch. 673; 22 L. T. 395	18
<i>Levitt v. Hamblett</i> , [1901] 2 K. B. 53; 70 L. J. K. B. 520; 84 L. T. 638; 6 Com. Cas. 79; 17 T. L. R. 307	194
<i>Levy v. Barnard</i> (1818), 2 Moo. 34; 8 Taunt. 149; 19 R. R. 484	161
— <i>v. Goldhill</i> , [1917] 2 Ch. 297; 86 L. J. Ch. 693; 117 L. T. 442; 33 T. L. R. 479	124
— <i>v. Richardson</i> (1889), 5 T. L. R. 236	172
— <i>v. Warburton</i> (1901), 70 L. J. K. B. 708	143
<i>Lewcock v. Bromley</i> (1920), 37 T. L. R. 48	57, 76, 173
<i>Lewes v. Barnett</i> (1878), 6 Ch. D. 252; 47 L. J. Ch. 144; 26 W. R. 101	116
— <i>v. Morgan</i> (1817), 5 Price, 42; 3 Y. & J. 230, 394; 19 R. R. 566.....	91
<i>Lewes Laundry v. Barclay</i> (1906), 95 L. T. 444; 22 T. L. R. 737	177
<i>Lewis, Re</i> (1883), 24 Ch. D. 339	281
— <i>v. Hillman</i> (1852), 3 H. L. C. 607; 19 L. J. Ch. 89; 1 M. & G. 488; 2 H. & Tw. 140; 14 Jur. 49; 88 R. R. 233	89
— <i>v. Lewis</i> (1890), 45 Ch. D. 281; 59 L. J. Ch. 712; 63 L. T. 84; 39 W. R. 75.....	62
— <i>v. Nicholson</i> (1852), 18 Q. B. 503; 21 L. J. Q. B. 311; 88 R. R. 683; 16 Jur. 1041; 19 L. T. 122	240
— <i>v. Ramsdale</i> (1886), 55 L. T. 179; 35 W. R. 8; 2 T. L. R. 691	49, 180
— <i>v. Read</i> (1845), 13 M. & W. 834; 14 L. J. Ex. 295; 67 R. R. 828	39
— <i>v. Samuel</i> (1846), 8 Q. B. 685; 15 L. J. Q. B. 218; 70 R. R. 582	145
— <i>v. Smith</i> (1848), 1 Mac. & G. 417; 84 R. R. 108	100
<i>Lidlow v. Wilmot</i> (1817), 2 Stark. 86; 19 R. R. 684	24
<i>Lienard v. Dressler</i> (1862), 3 F. & F. 212	58
<i>Life and Health Ass. Assn. v. Yule</i> (1904), 6 F. 437	174
<i>Lightbody v. Rahbula</i> (1895), 12 T. L. R. 102	143
<i>Lightfoot v. Keane</i> (1836), 1 M. & W. 745; T. & G. 1004; 2 Gale, 138; 3 L. J. Ex. 257; 46 R. R. 476	157
<i>Liles v. Terry</i> , [1895] 2 Q. B. 679; 65 L. J. Q. B. 34; 73 L. T. 428; 44 W. R. 116; 12 T. L. R. 26	90
<i>Lilley v. Doubleday</i> (1881), 7 Q. B. D. 510; 51 L. J. Q. B. 310; 44 L. T. 814	104
— <i>v. Foad</i> , [1899] 2 Ch. 107; 68 L. J. Ch. 517; 80 L. T. 827; 47 W. R. 579 ...	12, 220

TABLE OF CASES.

li

	PAGE
<i>Lilly v. Hays</i> (1826), 5 A. & E. 548; 1 N. & P. 26	258
— <i>v. Smales</i> , [1892] 1 Q. B. 456; 40 W. R. 544; 8 T. L. R. 410	252
<i>Limpus v. L. G. O. Co.</i> (1862), 1 H. & C. 526; 32 L. J. Ex. 34; 7 L. T. 641; 11 W. R. 149	210
<i>Linck v. Jameson</i> (1886), 2 T. L. R. 206	61, 204
<i>Lindsey C. C. v. Marshall</i> , [1937] A. C. 97; 105 L. J. K. B. 614; 155 L. T. 297; 100 J. P. 411; 34 L. G. R. 469; 80 S. J. 702; 52 T. L. R. 661; [1936] All E. R. 1076	215
<i>Lindus v. Bradwell</i> (1849), 5 C. B. 583; 17 L. J. C. P. 121; 78 R. R. 798	190
— <i>v. Melrose</i> (1858), 3 H. & N. 177; 27 L. J. Ex. 326; 117 R. R. 636	243
<i>Line v. R. S. P. C. A.</i> (1902), 18 T. L. R. 634	211
<i>Linford v. Prov. Ins. Co.</i> (1864), 34 Beav. 291; 11 L. T. 330; 10 Jur. 1066; 145 R. R. 116	53, 54, 173
<i>Linsell v. Bonsor</i> (1835), 2 Bing. N. C. 241; 2 Scott, 399; 1 Hodges, 305	221
<i>Lishman v. Christie</i> (1887), 19 Q. B. D. 333; 56 L. J. Q. B. 538; 57 L. T. 552	68, 219
<i>Lisset v. Reave</i> (1742), 2 Atk. 394	193
<i>Lister v. Stubbs</i> (1890), 45 Ch. D. 1; 59 L. J. Ch. 570; 62 L. T. 654; 6 T. L. R. 317	114
— <i>v. Van Haansbergen</i> (1876), 1 Q. B. D. 269; 45 L. J. Q. B. 495; 24 W. R. 395	240
<i>Litchfield v. Jones</i> (1887), 36 Ch. D. 530; 57 L. J. Ch. 100; 58 L. T. 20	116
<i>Litt v. Martindale</i> (1856), 18 C. B. 314; 107 R. R. 311	184
<i>Little v. Kingswood Colliery Co.</i> (1882), 20 Ch. D. 733; 51 L. J. Ch. 498; 47 L. T. 323	100
— <i>v. Spreadbury</i> , [1910] 2 K. B. 658; 79 L. J. K. B. 1119; 102 L. T. 829; 26 T. L. R. 552	15, 63
<i>Liverpool Household Stores, Re</i> (1890), 59 L. J. Ch. 616; 62 L. T. 873	9
<i>Liverpool Victoria, etc. Society v. Houston</i> , (1901) 3 F. 42	90
<i>Livingstone v. Ross</i> , [1901] A. C. 327; 70 L. J. P. C. 58; 85 L. T. 382	3
<i>Llewellyn, Re</i> , [1891] 3 Ch. 145; 60 L. J. Ch. 732; 65 L. T. 249; 39 W. R. 713	158
<i>Llewellyn v. Winckworth</i> (1845), 13 M. & W. 598; 14 L. J. Ex. 329; 67 R. R. 751	17
<i>Lloyd v. Coote</i> , [1915] 1 K. B. 242; 84 L. J. K. B. 567; 112 L. T. 344	90
— <i>v. Grace, Smith & Co.</i> , [1912] A. C. 716; 81 L. J. K. B. 1140; 107 L. T. 531; 28 T. L. R. 547	212
— <i>v. Guibert</i> (1865), L. R. 1 Q. B. 115; 6 B. & S. 100, 120; 33 L. J. Q. B. 241; 35 <i>ibid.</i> 74; 13 L. T. 602; 141 R. R. 352	65
— <i>v. Sigourney</i> (1828), 8 B. & C. 622; 5 Bing. 525; 3 Moo. & P. 229; 3 Y. & J. 220; 32 R. R. 510	184
<i>Lloyd-George, Ex p.</i> , [1898] 1 Q. B. 520; 67 L. J. Q. B. 412; 78 L. T. 182; 46 W. R. 322; 5 Manson, 11	152, 157
<i>Lloyd's v. Harper</i> (1881), 16 Ch. D. 290; 50 L. J. Ch. 140	261
<i>Lloyds Bank v. Bank of America National Trust, etc.</i> , [1938] 2 K. B. 147; 106 L. J. K. B. 897; 157 L. T. 38; 42 Com. Cas. 342; 81 S. J. 612; 54 T. L. R. 572; 2 All E. R. 63	182
— <i>v. Chartered Bank</i> , [1929] 1 K. B. 40; 97 L. J. K. B. 609; 139 L. T. 126; 44 T. L. R. 534	272
— <i>v. Cooke</i> , [1907] 1 K. B. 794; 76 L. J. K. B. 666; 96 L. T. 715; 23 T. L. R. 429	168
— <i>v. Swiss Bankverein</i> (1913), 108 L. T. 143; 29 T. L. R. 219; 18 Com. Cas. 79	178
<i>Locke v. Prescott</i> (1863), 32 Beav. 261; 138 R. R. 733	159
<i>Lockwood v. Abdy</i> (1845), 14 Sim. 437; 9 Jur. 267; 65 R. R. 621	72
— <i>v. Levick</i> (1860), 8 C. B. 603; 29 L. J. C. P. 340; 2 L. T. 357; 125 R. R. 806	125
<i>Lofts v. Bourke</i> (1884), 1 T. L. R. 58	121
<i>Loftus v. Roberts</i> (1902), 18 T. L. R. 532	119
<i>Logan, Ex p.</i> (1870), L. R. 9 Eq. 149	130
<i>Lomas v. Jones</i> , [1944] 1 K. B. 4; 170 L. T. 139; 60 T. L. R. 28; [1943] 2 All E. R. 548	51
<i>London and Colonial Co., Re</i> (1869), L. R. 7 Eq. 550; 38 L. J. Ch. 562; 20 L. T. 774	129
<i>London and County Bank v. Ratcliffe</i> (1881), 6 A. C. 722; 51 L. J. Ch. 28; 45 L. T. 322; 30 W. R. 109	158

	PAGE
London and Globe Finance Corp., <i>Re</i> , [1902] 2 Ch. 416; 71 L. J. Ch. 893; 87 L. T. 49; 18 T. L. R. 679	147, 150
London and Lancs. Ass. Co. v. Fleming, [1897] A. C. 499; 66 L. J. P. C. 116	54, 173
London and Scottish Bank, <i>Re</i> (1870), L. R. 9 Eq. 149	130
London Chartered Bank v. White (1879), 4 A. C. 413; 48 L. J. P. C. 75	147, 149
London C. C. v. Hobbis (1897), 75 L. T. 688; 45 W. R. 270; 61 J. P. 85	6
London County Freehold and Leasehold Properties, Ltd. v. Berkeley Property and Investment Co. (1936), 155 L. T. 190; 80 S. J. 652; 2 All E. R. 1039	212
London Financial Assn. v. Kelk (1883), 26 Ch. D. 107; 53 L. J. Ch. 1025; 50 L. T. 492	41
London Founders' Assn. v. Clarke (1888), 20 Q. B. D. 576; 57 L. J. Q. B. 291; 59 L. T. 93; 36 W. R. 489	192
London Freehold, etc., Co. v. Suffield, [1897] 2 Ch. 608; 66 L. J. Ch. 790; 77 L. T. 445; 46 W. R. 102	170, 176, 213
London Gen. Omnibus Co. v. Pope (1922), 35 T. L. R. 270	248
London Jewellers v. Attenborough, [1834] 2 K. B. 206; 103 L. J. K. B. 429; 39 Com. Cas. 290; 151 L. T. 124; 78 S. J. 413; 50 T. L. R. 436	182
London Joint Stock Bank v. Macmillan, [1918] A. C. 777; 119 L. T. 387; 34 T. L. R. 509	145
— v. Simmons, [1892] A. C. 201; 61 L. J. Ch. 723; 66 L. T. 625; 41 W. R. 108; 8 T. L. R. 478	178
Long, <i>Re</i> (1881), 16 Ch. D. 617; 50 L. J. Ch. 448; 44 L. T. 63; 29 W. R. 448	151
— v. Millar (1879), 4 C. P. D. 450; 48 L. J. C. P. 596; 41 L. T. 306; 27 W. R. 720	248
— v. Orsi (1856), 18 C. B. 610; 26 L. J. C. P. 127; 107 R. R. 432	135
Longman v. Bath Tramways, [1905] 1 Ch. 646; 74 L. J. Ch. 424; 53 W. R. 480; 92 L. T. 743; 21 T. L. R. 373	173
Lord v. Hall (1848), 2 C. & K. 698	70
— v. Kellett (1833), 2 Myl. & K. 1	31
Loring v. Davis (1886), 32 Ch. D. 625; 55 L. J. Ch. 725; 54 L. T. 899; 2 T. L. R. 645	48
Lott v. Outhwaite (1893), 10 T. L. R. 76	119, 126
Louis v. Smellie (1895), 73 L. T. 226; 11 T. L. R. 515	90
Love v. Mack (1905), 93 L. T. 352	11
Lovegrove v. White (1871), L. R. 6 C. P. 440; 40 L. J. C. P. 253; 24 L. T. 554; 19 W. R. 823	64
Lovesy v. Palmer, [1916] 2 Ch. 233; 85 L. J. Ch. 481; 114 L. T. 1033	7
Lowe v. Dorling, [1906] 2 K. B. 772; 75 L. J. K. B. 1019; 95 L. T. 243; 22 T. L. R. 779, C. A., affirming [1905] 2 K. B. 501; 74 L. J. K. B. 794; 93 L. T. 398; 54 W. R. 28; 21 T. L. R. 616	268
— v. G. N. Ry. (1893), 62 L. J. Q. B. 524; 9 T. L. R. 516	55, 216
Lowry v. Guilford (1832), 5 C. & P. 234; 38 R. R. 818	108
Lowther v. Harris, [1927] 1 K. B. 393; 96 L. J. K. B. 170; 136 L. T. 377; 43 T. L. R. 24	23
— v. Lowther (1806), 13 Ves. 95, 102	85
Lucas v. Beale (1851), 10 C. B. 739; 20 L. J. C. P. 134	263
— v. Dorrien (1817), 7 Taunt. 278; 1 Moo. 29; 18 R. R. 480	151
— v. Fitzgerald (1903), 20 T. L. R. 16	105, 116
— v. Mason (1875), L. R. 10 Ex. 251; 44 L. J. Ex. 145	206
Luckombe v. Ashton (1862), 2 F. & F. 705; 121 R. R. 824	16
Lucy v. Walrond (1837), 6 L. J. C. P. 296; 3 Bing. N. C. 841; 5 Scott, 46; 3 Hodges, 215; 43 R. R. 815	44
Luddy's Trustees v. Peard (1886), 33 Ch. D. 500; 55 L. J. Ch. 884; 55 L. T. 137; 2 T. L. R. 841	88, 101
Ludgater v. Love (1881), 44 L. T. 694; 45 J. P. 600	200, 212
Ludlow (Corpn.) v. Charlton (1840), 6 M. & W. 815, 822; 10 L. J. Ex. 75; 8 C. & P. 242; 4 Jur. 667; 55 R. R. 794	31
Lumley v. Nicholson (1886), 34 W. R. 716; 2 T. L. R. 711	123
Lupton v. White (1808), 15 Ves. 432; 10 R. R. 94	77

TABLE OF CASES.

lii

	PAGE
<i>Lutscher v. Comptoir d'Escompte</i> (1876), 1 Q. B. D. 709; 34 L. T. 798	148
<i>Luxor (Eastbourne), Ltd. v. Cooper</i> , [1941] A. C. 108; 110 L. J. K. B. 131; 164 L. T. 313; 57 T. L. R. 213; [1941] 1 All E. R. 33	127, 128
<i>Lyall v. Hicks</i> (1859), 27 Beav. 616; 122 R. R. 577	66
<i>Lyddon v. Moss</i> (1859), 4 De G. & J. 104; 5 Jur. 637; 7 W. R. 433; 124 R. R. 179... ..	87
<i>Lydney Iron Ore Co. v. Bird</i> (1886), 33 Ch. D. 85; 55 L. J. Ch. 875; 55 L. T. 558; 2 T. L. R. 722	95
<i>Lyell v. Kennedy</i> (1889), 14 App. Cas. 437; 59 L. J. Q. B. 268; 62 L. T. 77; 38 W. R. 353	36, 42, 82
<i>Lynch v. Coel</i> (1865), 12 L. T. 548; 13 W. R. 846	62, 63
<i>Lynde v. Anglo-Italian Hemp Co.</i> , [1896] 1 Ch. 178; 65 L. J. Ch. 96	175
<i>Lyons v. Elliott</i> (1876), 1 Q. B. D. 210; 45 L. J. Q. B. 159; 33 L. T. 806; 24 W. R. 296	232
<i>Lythgoe v. Vernon</i> (1860), 5 H. & N. 180; 29 L. J. Ex. 164; 120 R. R. 536	41, 44
<i>MAANSS v. Henderson</i> (1801), 1 East, 335	160, 161
<i>Macaulay v. Polley</i> , [1897] 2 Q. B. 122; 66 L. J. Q. B. 665; 76 L. T. 643; 45 W. R. 681	64
<i>M'Auliffe v. Bicknell</i> (1835), 2 C. M. & R. 263; 1 Gale, 232	185
<i>Macbeath v. Ellis</i> (1828), 4 Bing. 578	274
— <i>v. Haldimund</i> (1786), 1 T. R. 172; 1 R. R. 177	234
<i>MacCall v. Australian Meat Co.</i> (1870), 19 W. R. 188	281
<i>McCartan v. Belfast Harbour Commissioners</i> , [1911] 2 Ir. R. 143	213
<i>McCarthy v. Colvin</i> (1839), 9 A. & E. 607; 1 P. & D. 429; 8 L. J. Q. B. 158; 48 R. R. 606	81
<i>McCaul v. Strauss</i> (1883), 1 C. & E. 106	191
<i>McClure v. Schemeil</i> (1871), 20 W. R. 168	197, 198
<i>McCollin v. Gilpin</i> (1881), 6 Q. B. D. 516; 44 L. T. 914	244
<i>M'Combie v. Davies</i> (1805), 7 East, 5; 3 Smith, 3; 8 R. R. 534	184
<i>MacDonnell, Ex p.</i> (1819), Buck. 399	282
— <i>v. Harding</i> (1834), 7 Sim. 178; 4 L. J. Ch. 10; 40 R. R. 95	104
<i>McEntire v. Potter</i> (1889), 22 Q. B. D. 438; 5 T. L. R. 293	271, 281
<i>M'Ewen v. Woods</i> (1847), 11 Q. B. 13; 17 L. J. Q. B. 206; 75 R. R. 274	59
<i>Macfarlane v. Giannacopulo</i> (1858), 28 L. J. Ex. 72; 3 H. & N. 660; 117 R. R. 1014; 32 L. T. 133	198
— <i>v. Lister</i> (1888), 37 Ch. D. 88; 57 L. J. Ch. 92; 58 L. T. 201; 4 T. L. R. 106	162, 155
<i>Macfisheries v. Harrison</i> (1924), 93 L. J. K. B. 811; 132 L. T. 22; 40 T. L. R. 709... ..	19
<i>McGowan, Ex p.</i> (1891), 64 L. T. 28; 39 W. R. 320; 7 T. L. R. 207	224
— <i>v. Dyer</i> (1873), L. R. 8 Q. B. 141; 21 W. R. 560	172
<i>Machin v. S. W. Ry.</i> (1847), 10 L. T. (o.s.) 288	220
<i>McKay v. Commercial Bank of New Brunswick</i> (1874), L. R. 5 P. C. 394; 43 L. J. P. C. 31; 30 L. T. 180; 22 W. R. 473	211, 212
<i>McKay's Case</i> (1875), 2 Ch. D. 1; 45 L. J. Ch. 148; 33 L. T. 517	113
<i>McKean v. Raynor Bros., Ltd.</i> (1942), 167 L. T. 369; [1942] 2 All E. R. 650	209
<i>McKellar v. Wallace</i> (1853), 5 Moo. Ind. App. 372	91
<i>M'Kenna, Ex p.</i> (1861), 3 D. F. & J. 629; 30 L. J. Bk. 20; 4 L. T. 164; 130 R. R. 270	149
— <i>v. Harding</i> (1905), 69 J. P. 354	286
<i>Mackenzie v. British Linen Co.</i> (1881), 6 App. Cas. 82; 44 L. T. 431; 29 W. R. 477... ..	34
— <i>v. Johnston</i> (1819), 4 Madd. 373	91
— <i>v. Macintosh</i> (1891), 64 L. T. 706	153
— <i>v. Pooley</i> (1856), 11 Ex. 638; 35 L. J. Ex. 124; 105 R. R. 698; 26 L. T. 223; 4 W. R. 262	65
<i>Mackenzie-Kennedy v. Air Council</i> , [1927] 2 K. B. 517; 96 L. J. K. B. 1145; 43 T. L. R. 733	267

	PAGE
<i>Mackersy v. Ramsays</i> (1843), 9 C. & F. 818; 57 R. R. 183	116
<i>Mackie v. European Ass. Society</i> (1869), 21 L. T. 102; 17 W. R. 987	170
<i>Mackintosh v. Mitcheson</i> (1849), 4 Ex. 175; 18 L. J. Ex. 385; 80 R. R. 513	66
<i>Maclae v. Sutherland</i> (1854), 3 E. & B. 1; 23 L. J. Q. B. 229; 2 C. L. R. 1320; 18 Jur. 942; 22 L. T. 254; 97 R. R. 332	41, 55
<i>M'Larnon v. Carrickfergus U. C.</i> , [1904] 2 Ir. R. 44	152, 153
<i>Macllean v. Dunn</i> (1828), 1 M. & P. 671; 4 Bing. 722; 29 R. R. 714; 6 L. J. (o.s.) C. P. 184	33, 41
<i>McLean v. Fleming</i> (1871), 2 H. L. Sc. App. 128; 25 L. T. 317	65, 68, 219
<i>McLean's Case</i> (1885), 55 L. J. Ch. 36; 53 L. T. 250; 1 T. L. R. 660	113
<i>Maclod, The</i> (1880), 5 P. D. 254	133
<i>Maclod v. Artola</i> (1889), 6 T. L. R. 68	119
— <i>v. Jones</i> (1883), 24 Ch. D. 289; 53 L. J. Ch. 145	89
<i>Maclure, Ex p.</i> (1870), L. R. 5 Ch. 737; 39 L. J. Ch. 685; 23 L. T. 685	130
<i>McManus v. Fortescue</i> , [1907] 2 K. B. 1; 76 L. J. K. B. 393; 96 L. T. 444; 23 T. L. R. 292	167, 239, 251
<i>M'Millan v. Accident Ass. Co.</i> , [1907] S. C. 484	174
<i>Macoun v. Erskine</i> , [1901] 2 K. B. 493; 70 L. J. K. B. 973; 85 L. T. 372	141
<i>McPherson v. Watt</i> (1877), 3 App. Cas. 254	89
<i>Madden v. Kempster</i> (1807), 1 Camp. 12	149
<i>Maddick v. Marshall</i> (1864), 17 C. B. 829; 11 L. T. 611; 13 W. R. 205; 10 Jur. 770; 139 R. R. 537	16
<i>Magdalena Steam Nav. Co., Re</i> (1860), 29 L. J. Ch. 667; Johns. 690; 6 Jur. 975; 8 W. R. 329; 123 R. R. 295	41
<i>Magee v. Atkinson</i> (1837), 2 M. & W. 440; 6 L. J. Ex. 115; 46 R. R. 635	237, 247
<i>Magnus v. Queensland Bank</i> (1888), 37 Ch. D. 466; 57 L. J. Ch. 413	272
<i>Mahony v. East Holyford Mining Co.</i> (1875), L. R. 7 H. L. 869; 33 L. T. 383...18, 32, 171 — <i>v. Kekulé</i> (1854), 14 C. B. 390; 23 L. J. C. P. 54; 98 R. R. 669	244
<i>Maile v. Mann</i> (1848), 17 L. J. Ex. 336; 2 Ex. 608; 6 D. & L. 42; 76 R. R. 699	239
<i>Mainprice v. Westley</i> (1865), 6 B. & S. 420; 34 L. J. Q. B. 229; 13 L. T. 560; 14 W. R. 9; 11 Jur. 975; 141 R. R. 452	239
<i>Mahnwaring v. Brandon</i> (1818), 2 Moo. 125; 19 R. R. 497	110
— <i>v. Leslie</i> (1826), 2 C. & P. 507; M. & M. 18; 31 R. R. 691	23
<i>Mair v. Himalayan Tea Co.</i> (1865), 14 W. R. 165; 11 Jur. 1013; L. R. 1 Eq. 411; 13 L. T. 586	19
<i>Makepeace v. Rogers</i> (1865), 4 D. J. & S. 649; 34 L. J. Ch. 396; 12 L. T. 12, 221; 13 W. R. 450, 566; 11 Jur. 314	90
<i>Malcolm v. Scott</i> (1850), 5 Ex. 601	260
<i>Mallough v. Barber</i> (1815), 4 Camp. 150	78, 106
<i>Maltby v. Christie</i> (1795), 1 Esp. 340	78
<i>Man v. Shiffner</i> (1802), 2 East, 523	161
<i>Manby, Re</i> (1856), 26 L. J. Ch. 313	31, 252
— <i>v. Scott</i> (1660), 1 Lev. 4	27
<i>Manchester Bank, Ex p.</i> (1891), 39 W. R. 303	230
<i>Manchester Trust v. Furness; Manchester Trust v. Turner</i> , [1895] 2 Q. B. 539; 64 L. J. Q. B. 766; 73 L. T. 110; 44 W. R. 178; 11 T. L. R. 530	17, 201
<i>Mander, Re</i> (1902), 86 L. T. 234	281
<i>Manley v. Berkett</i> , [1912] 2 K. B. 329; 81 L. J. K. B. 1232	265
<i>Mann v. Edinburgh Tram. Co.</i> (1892), 9 T. L. R. 102	95
— <i>v. Forrester</i> (1814), 4 Camp. 60; 15 R. R. 724	147, 160, 202
<i>Manningford v. Toleman</i> (1845), 1 Coll. 670; 66 R. R. 239	156
<i>Mansell v. Clements</i> (1874), L. R. 9 C. P. 139	122
<i>Manser v. Back</i> (1848), 6 Hare, 443; 77 R. R. 187	283
<i>Manson v. Baillie</i> (1855), 2 Macq. H. L. C. 80; 149 R. R. 120	119
<i>Marconi's Wireless Telegraph Co. v. Newman</i> , [1930] 2 K. B. 292; 99 L. J. K. B. 687; 143 L. T. 471	12

TABLE OF CASES.

iv

	PAGE
<i>Mare v. Charles</i> (1856), 5 E. & B. 978; 25 L. J. Q. B. 119; 108 R. R. 831	241
<i>Margaret Mitchell, The</i> (1858), Swa. 382; 4 Jur. 1193	67, 283
<i>Margetson and Jones, Re</i> , [1897] 2 Ch. 314; 66 L. J. Ch. 619; 76 L. T. 805; 45 W. R. 645	154
<i>Maries v. Maries</i> (1853), 23 L. J. Ch. 154	31
<i>Mariposa, The</i> , [1906] P. 273; 65 L. J. P. 104; 75 L. T. 54; 45 W. R. 191; 12 T. L. R. 518	66
<i>Markby, Ex p.</i> (1864), 11 L. T. 250	162
<i>Markwick v. Hardingham</i> (1880), 15 Ch. D. 339; 43 L. T. 647; 29 W. R. 361	11, 280
<i>Marnham, Ex p.</i> (1861), 2 D. F. & J. 634; 30 L. J. Bk. 3; 6 Jur. 1273; 3 L. T. 516; 9 W. R. 131	143
<i>Marris v. Ingram</i> (1879), 13 Ch. D. 338; 49 L. J. Ch. 123; 41 L. T. 613; 28 W. R. 434	116
<i>Marsden v. City & Coy. Ass. Co.</i> (1865), L. R. 1 C. P. 232; 35 L. J. C. P. 60; 13 L. T. 465; 14 W. R. 108; 148 R. R. 648	285
<i>Marseilles Ry., Re</i> (1872), L. R. 7 Ch. 161; 41 L. J. Ch. 345; 25 L. T. 858; 20 W. R. 254	222
<i>Marsh v. Jelf</i> (1862), 3 F. & F. 234; 130 R. R. 836	62, 133
— <i>v. Joseph</i> , [1897] 1 Ch. 214; 66 L. J. Ch. 129; 75 L. T. 558; 45 W. R. 209; 13 T. L. R. 136	39
— <i>v. Keating</i> (1834), 1 Bing. 198; 1 Mont. & A. 582, 592; 2 C. & F. 250; 8 Bli. 651; 1 Scott, 5; 37 R. R. 75	214
— <i>v. Pedder</i> (1815), 4 Camp. 257	196
<i>Marshall v. Cliff</i> (1815), 4 Camp. 133	221
— <i>v. Glanvill</i> , [1917] 2 K. B. 87; 86 L. J. K. B. 767; 116 L. T. 560; 33 T. L. R. 301	124, 275
— <i>v. Nat. Prov. Bank</i> (1892), 61 L. J. Ch. 465; 66 L. T. 525; 40 W. R. 328	176
— <i>v. Parsons</i> (1841), 9 C. & P. 656	118
<i>Marten v. Gibbon</i> (1875), 33 L. T. 561; 24 W. R. 87	139
— <i>v. Rooke</i> (1885), 53 L. T. 946; 34 W. R. 253; 2 T. L. R. 140	178
<i>Martin v. Perry</i> , [1931] 2 K. B. 310; 100 L. J. K. B. 582; 145 L. T. 455; 75 S. J. 259; 47 T. L. R. 377	125
— <i>v. Tucker</i> (1885), 1 T. L. R. 655	126
<i>Martini v. Coles</i> (1813), 1 M. & S. 140	60, 97
<i>Martinus v. Helmuth</i> (1815), Coop. 245; 2 Ves. & B. 407; 13 R. R. 126	165
<i>Martinson v. Clowes</i> (1882), 21 Ch. D. 857; 51 L. J. Ch. 594	85
<i>Mary Ann, The</i> (1865), L. R. 1 Ad. 8	156
<i>Mason, Re</i> (1878), 10 Ch. D. 729; 48 L. J. Ch. 193; 27 W. R. 311	162
— <i>v. Clifton</i> (1863), 3 F. & F. 899; 130 R. R. 907	44, 72
— <i>v. Hamilton</i> (1831), 5 Sim. 19	165
— <i>v. Joseph</i> (1804), 1 Smith, 406	69
<i>Massey v. Banner</i> (1820), 1 Jac. & W. 241; 4 Madd. 413; 21 R. R. 150	77, 78, 104
— <i>v. Davies</i> (1794), 2 Ves. jun. 317; 2 R. R. 218	85
— <i>v. Morris</i> , [1894] 2 Q. B. 412; 63 L. J. M. C. 185; 70 L. T. 873; 42 W. R. 638	286
<i>Massey and Carey, Re</i> (1884), 26 Ch. D. 459; 53 L. J. Ch. 705; 51 L. T. 390; 32 W. R. 1008	135
<i>Mather, Ex p.</i> (1797), 3 Ves. 373	74, 142
<i>Mathews v. Brown</i> (1894), 63 L. J. Q. B. 494; 10 T. L. R. 386	271
<i>Mathilda, The</i> (1883), 5 Asp. M. C. 75; 48 L. T. 771	65, 68
<i>Matthews v. Gibbs</i> (1860), 30 L. J. Q. B. 55; 3 L. T. 551; 9 W. R. 200; 3 E. & E. 282; 7 Jur. 186; 122 R. R. 697	232
— <i>v. Haydon</i> (1796), 2 Esp. 509	116
— <i>v. Munster</i> (1887), 20 Q. B. D. 141; 57 L. J. Q. B. 49; 57 L. T. 922; 36 W. R. 178; 52 J. P. 260; 4 T. L. R. 102	62
<i>Matthias v. Meanard</i> (1826), 2 C. & P. 353	232
<i>Matvieff v. Croasfield</i> (1903), 51 W. R. 365; 8 Com. Cas. 120	48
<i>Maund v. Monmouth Canal Co.</i> (1842), 4 M. & G. 452; 11 L. J. C. P. 317; Car. & M. 606; 5 Scott, N. R. 457	215

	PAGE
Maunder v. Conyers (1817), 2 Stark. 281	17
Maw v. Pearson (1860), 28 Beav. 196	72
Mawson, Re (1881), 44 L. T. 523; 29 W. R. 615	228
Maxfield v. Burton (1873), L. R. 17 Eq. 15; 43 L. J. Ch. 46; 29 L. T. 571; 22 W. R. 148	226
Maxted v. Paine (1869), L. R. 4 Ex. 203; 38 L. J. Ex. 129	193
Maxwell v. Port Tennant Fuel Co. (1857), 24 Beav. 495	232
May, Re (1858), 4 Jur. 1169	119
— <i>v. Angeli</i> (1897), 14 T. L. R. 551	59, 136
— <i>v. Skey</i> (1849), 16 Sim. 588; 18 L. J. Ch. 306	25
Maybery v. Mansfield (1846), 16 L. J. Q. B. 102; 9 Q. B. 754; 11 Jur. 60; 72 R. R. 440	239
Maydew v. Forrester (1814), 5 Taunt. 615; 15 R. R. 597	106, 110
Mayhew v. Eames (1825), 3 L. J. (o.s.) K. B. 108; 3 B. & C. 601; 1 C. & P. 550; 5 D. & R. 484; 27 R. R. 427	200
Medina, The (1876), 2 P. D. 5; 35 L. T. 779; 25 W. R. 156	66
Meek v. Wendt (1888), 21 Q. B. D. 126; 59 L. T. 558	254
Megaw v. Molloy (1878), L. R. 2 Ir. 530	62
Meguerditchian v. Lightbound , [1917] 2 K. B. 298; 86 L. J. K. B. 889; 116 L. T. 790	157
Mehta v. Sutton (1913), 109 L. T. 529; 30 T. L. R. 17	180
Melhado v. Porto Alegre, etc., Ry. (1874), L. R. 9 C. P. 503; 43 L. J. C. P. 253; 31 L. T. 57	35
Mercantile Bank of India v. Chartered Bank of India, etc. (1937), 43 Com. Cas. 80; 158 L. T. 412; 1 All E. R. 231	171
Mercer v. Wright (1917), 33 T. L. R. 343	188, 244
Merchants of Staple v. Bank of England (1888), 21 Q. B. D. 160; 57 L. J. Q. B. 418; 36 W. R. 880; 52 J. P. 580; 4 T. L. R. 46	177
Merodith v. Flaxman (1831), 5 C. & P. 99	269
— <i>v. Footner</i> (1843), 11 M. & W. 202; 12 L. J. Ex. 183; 63 R. R. 581	220
Mersey Docks, etc., Board, Ex p. (1899), 1 Q. B. 546; 68 L. J. Q. B. 540; 80 L. T. 143; 47 W. R. 306	164, 165
Mersey Docks Trustees v. Gibbs (1864), L. R. 1 H. L. 93; 14 L. T. 677; 35 L. J. Ex. 225; 12 Jur. 571; 14 L. T. 677; 14 W. R. 872; 145 R. R. 385	214
Messenger, Re (1875), 3 Ch. D. 317	162
Metcalf v. Clough (1828), 2 M. & R. 178; 6 L. J. (o.s.) K. B. 281; 32 R. R. 702	276
— <i>v. Shaw</i> (1811), 3 Camp. 22; 13 R. R. 740	28, 195
Metropolitan Asylum Board v. Kingham (1890), 6 T. L. R. 217	37
Metropolitan Bank v. Heiron (1880), 5 Ex. D. 319	112
Meux's Executors' Case (1852), 2 D. M. & G. 522; 95 R. R. 203	219
Mews v. Carr (1856), 1 H. & N. 484; 108 R. R. 683; 26 L. J. Ex. 39	13
Meyer v. Charters (1918), 34 T. L. R. 589	226
— <i>v. Dresser</i> (1864), 16 C. B. 646; 33 L. J. C. P. 289; 10 L. T. 612; 12 W. R. 983; 139 R. R. 643	68
— <i>v. Sze Hai Tong Banking, etc., Co.</i> , [1913] A. C. 847; 83 L. J. P. C. 103; 109 L. T. 691	170
Meyerstein v. Eastern Agency Co. (1885), 1 T. L. R. 595	116
Michael v. Hart , [1902] 1 K. B. 482; 71 L. J. K. B. 265; 86 L. T. 474; 50 W. R. 308; 18 T. L. R. 254	111
Michelin Tyre Co. v. Macfarlane (1917), 55 Sc. L. R. 35	3
Middleditch v. Sharland (1799), 5 Ves. 87	91
Middleton v. Pollock (1876), 4 Ch. D. 49; 46 L. J. Ch. 39	231
— <i>v. Welles</i> (1785), 4 Bro. P. C. 245	90
Mid-Kent Fruit Factory, Re , [1896] 1 Ch. 567; 65 L. J. Ch. 250; 74 L. T. 22; 44 W. R. 284	138
Midland Bank v. Reckitt , [1933] A. C. 1; 102 L. J. K. B. 297; 37 Com. Cas. 202; 76 S. J. 165; 48 T. L. R. 271	49, 51, 168, 183, 272

TABLE OF CASES.

lvii

	PAGE
Mildred v. Maspons (1883), 8 A. C. 874; 53 L. J. Q. B. 33; 49 L. T. 685; 32 W. R. 125	159, 161, 203
Miles v. Bernard (1795), 2 Peake, 61	103
Miles's Claim (1874), L. R. 9 Ch. 635; 43 L. J. Ch. 732; 31 L. T. 9; 22 W. R. 889...	180
Millar v. Radford (1903), 19 T. L. R. 575	121, 122
Miller v. Beale (1879), 27 W. R. 403	119
— <i>v. Kimbray</i> (1867), 16 L. T. 360	223
— <i>v. Smith</i> , [1917] 2 K. B. 141; 86 L. J. K. B. 1259; 116 L. T. 753; 33 T. L. R. 295	188, 244, 245
Mills, Re (1893), 10 M. B. R. 193	229
Milvan v. Perez (1861), 3 E. & E. 495; 30 L. J. Q. B. 90; 3 L. T. 736; 9 W. R. 269; 7 Jur. 336; 122 R. R. 813	240
Minett v. Forrester (1811), 4 Taunt. 541; 13 R. R. 676.....	138
Minister of Supply v. British Thomson-Houston Co., Ltd. , [1943] 1 K. B. 478; 112 L. J. K. B. 520; 168 L. T. 389; 59 T. L. R. 242; [1943] 1 All E. R. 615	235
Misa v. Currie (1876), 1 A. C. 554; 45 L. J. Ex. 852; 35 L. T. 414	149, 159
Mitcalfe's Case (1879), 13 Ch. D. 169; 49 L. J. Ch. 301; 41 L. T. 717; 28 W. R. 309...	113
Mitchell, Re (1884), 54 L. J. Ch. 342; 52 L. T. 178	116
— <i>v. Crassweller</i> (1853), 13 C. B. 237; 22 L. J. C. P. 100; 93 R. R. 517	211
— <i>v. Hayne</i> (1824), 2 Sim. & S. 63; 25 R. R. 151	164
— <i>v. Kahl</i> (1862), 2 F. & F. 709	252
— <i>v. Newhall</i> (1846), 15 M. & W. 308; 15 L. J. Ex. 292	78
Mitcheson v. Oliver (1855), 5 E. & B. 419; 25 L. J. Q. B. 39; 103 R. R. 545; 1 Jur. 900; 25 L. T. 258	65
Mizen v. Pick (1838), 3 M. & W. 481; 1 H. & H. 163; 7 L. J. Ex. 153; 49 R. R. 694	25
Moffatt v. Bateman (1869), L. R. 3 P. C. 115; 22 L. T. 140; 6 Moo. P. C. C. 369 ...	78, 107
— <i>v. Parsons</i> (1814), 1 Marsh. 55; 5 Taunt. 307; 15 R. R. 506	169
Moir v. Marten (1891), 7 T. L. R. 330	124
Moldaut, Ex p. (1833), 3 Dea. & Ch. 351	229
Mole v. Smith (1820), 1 Jac. & Walk. 673; Jacob, 490; 28 R. R. 37, n.	63
Molony v. Kernan (1842), 2 Dr. & War. 31; 59 R. R. 635	87
Monaghan v. Taylor (1886), 2 T. L. R. 685	206
Monet, Ex p. (1883), 12 Q. B. D. 44; 53 L. J. Q. B. 16; 49 L. T. 737; 32 W. R. 264	116
Moneypenny v. Hartland (1824), 1 C. & P. 352; 3 L. J. (o.s.) K. B. 66.....	132
Montagu v. Benedict (1825), 5 D. & R. 532; 3 B. & C. 631; 1 C. & P. 356; 27 R. R. 444; 3 L. J. (o.s.) K. B. 94	21
— <i>v. Forwood</i> , [1893] 2 Q. B. 350; 69 L. T. 371; 42 W. R. 124; 9 T. L. R. 634	72, 161, 203
Montague v. Perkins (1853), 22 L. J. C. P. 187; 94 R. R. 862	168
Montaignac v. Shitta (1890), 15 A. C. 357	169
Montesquieu v. Sandys (1811), 18 Ves. 302; 11 R. R. 197	88
Montgomerie v. U. K. Mutual S. S. Ass. , [1891] 1 Q. B. 370; 60 L. J. Q. B. 429; 64 L. T. 323; 39 W. R. 351; 7 T. L. R. 203	187
Montgomery v. Liebenenthal , [1898] 1 Q. B. 487; 67 L. J. Q. B. 313; 78 L. T. 211; 46 W. R. 292	6
Montreal Ass. Co. v. Mc'Gillivray (1859), 13 Moo. P. C. C. 87; 8 W. R. 165; 132 R. R. 48	4, 46
— <i>v. Robert</i> , [1906] A. C. 196; 75 L. J. P. C. 33; 94 L. T. 229	171
Moody v. Cox , [1917] 2 Ch. 71; 86 L. J. Ch. 424	89
— <i>v. Pall Mall Deposit, etc. Co.</i> (1917), 33 T. L. R. 306	181
— <i>v. Spencer</i> (1822), 2 D. & R. 6; 1 L. J. (o.s.) K. B. 1	161
moor Lane v. Dreyfus , [1918] 1 K. B. 89; 87 L. J. K. B. 126; 118 L. T. 87	120
Moore v. Bushell (1857), 27 L. J. Ex. 3; 114 R. R. 984	259
— <i>v. Clementson</i> (1809), 2 Camp. 22; 11 R. R. 653	202
— <i>v. Flanagan</i> , [1920] 1 K. B. 919; 89 L. J. K. B. 417; 122 L. T. 739	196

	PAGE
Moore v. Maxwell (1848), 2 C. & K. 554	118
— v. Metro. Ry. (1872), L. R. 8 Q. B. 36; 42 L. J. Q. B. 23; 27 L. T. 579; 21 W. R. 145	216
— v. Mourgue, (1776), Cowp. 479	74, 103, 106
— v. Peachey (1891), 7 T. L. R. 748	11
— v. Palmer (1886), 2 T. L. R. 781	213
— v. Usher (1835), 7 Sim. 383; 4 L. J. Ch. 194, 205	164
Morell v. Westmoreland, [1904] A. C. 11; 73 L. J. K. B. 93; 89 L. T. 702; 52 W. R. 353; 20 T. L. R. 38	20, 22, 196
Morgan v. Blyth, [1891] 1 Ch. 337; 60 L. J. Ch. 66; 63 L. T. 546; 39 W. R. 422 ...	109
— v. Chetwynd (1865), 4 F. & F. 451	20
— v. Couchman (1853), 14 C. B. 100; 2 C. L. R. 53; 23 L. J. C. P. 36; 98 R. R. 555	197
— v. Elford (1876), 4 Ch. D. 352	112, 232
— v. Minnett (1877), 6 Ch. D. 638; 36 L. T. 948; 25 W. R. 744	90
— v. Stephens (1861), 3 Giff. 226; 4 L. T. 614; 7 Jur. 701; 133 R. R. 86	272
Morison v. Kemp (1912), 29 T. L. R. 70	183
— v. L. C. & W. Bank, [1914] 3 K. B. 357; 83 L. J. K. B. 1202; 111 L. T. 114; 30 T. L. R. 481; 19 Com. Cas. 273	272
— v. Thompson (1874), L. R. 9 Q. B. 480; 43 L. J. Q. B. 215; 30 L. T. 869; 22 W. R. 859	92, 94
Morley v. Makin (1906), 54 W. R. 395; 22 T. L. R. 7	243
Morrell v. Wootten (1852), 16 Beav. 197; 96 R. R. 95	260
Morris, Re, [1908] 1 K. B. 473; 77 L. J. K. B. 265; 98 L. T. 500	163
— v. Cleasby (1816), 4 M. & S. 566; 14 R. R. 531	3, 102, 137
— v. Hunt (1896), 12 T. L. R. 187	121
— v. Salberg (1889), 22 Q. B. D. 614; 61 L. T. 283; 5 T. L. R. 376	63, 208
— v. Wilson (1859), 5 Jur. 168; 115 R. R. 1004	186
Morrison v. Universal Ins. Co. (1873), L. R. 8 Ex. 197; 42 L. J. Ex. 115	200
Morten v. Hilton, Gibbes and Smith (1908), [1937] 2 K. B. 176, n.; 106 L. J. K. B. 857, n.; 157 L. T. 532, n.	141
Mortimer v. McCallan (1840), 9 L. J. Ex. 73; 6 M. & W. 58; 4 Jur. 172; 55 R. R. 503	196
— v. Wright (1840), 9 L. J. Ex. 158; 4 Jur. 465; 6 M. & W. 482; 55 R. R. 704 ...	29
Mortlock v. Buller (1804), 10 Ves. 311; 7 R. R. 417	30
Mostyn v. Mostyn (1870), L. R. 5 Ch. 457; 39 L. J. Ch. 780; 22 L. T. 461; 18 W. R. 657	64
Mote v. Gould (1934), 452 L. T. 347	121, 126
Motion v. Michaud (1892), 8 T. L. R. 447	283
Moule, Ex p. (1821), 5 Madd. 462	162
Mousell Bros., Ltd. v. L. & N. W. Ry., [1917] 2 K. B. 837; 87 L. J. K. B. 82; 118 L. T. 25	287, 289
Moxham v. Grant, [1900] 1 Q. B. 88; 69 L. J. Q. B. 97; 7 Manson, 65	105
Moxon v. Sheppard (1890), 24 Q. B. D. 627; 59 L. J. Q. B. 286; 62 L. T. 726; 38 W. R. 704	153
Mozeley v. Cowie (1877), 47 L. J. Ch. 271; 38 L. T. 908	91
Muir v. Fleming (1823), D. & R. N. P. C. 29; 25 R. R. 775	149
Mullens v. Miller (1882), 22 Ch. D. 194; 52 L. J. Ch. 380; 48 L. T. 103; 31 W. R. 559	52, 200
Mulligan v. M'Donagh (1860), 2 L. T. 136	103
Mullins v. Collins (1874), L. R. 9 Q. B. 292; 43 L. J. M. C. 67; 29 L. T. 838; 22 W. R. 297	287
Munro v. De Chemant (1815), 4 Camp. 215	29
Munton, Re, [1927] 1 Ch. 262; 96 L. J. Ch. 151; 136 L. T. 661	6
Murfitt v. Royal Ins. Co. (1922), 38 T. L. R. 334	173
Murphy v. De Boëse (1875), L. R. 10 Ex. 126; 44 L. J. Ex. 40; 32 L. T. 122; 23 W. R. 474	14

TABLE OF CASES.

lxix

	PAGE
Murphy v. O'Shea (1845), 2 J. & L. 422; 8 Ir. Eq. R. 329; 69 R. R. 337	89
Murray, <i>Re</i> (1887), 57 L. T. 223	228
— v. Currie (1870), L. R. 6 C. P. 24; 40 L. J. C. P. 26	213
— v. E. I. Co. (1821), 5 B. & All 204; 24 R. R. 325	50
— v. Mann (1848), 2 Ex. 538; 17 L. J. Ex. 256; 76 R. R. 686	81
Musson v. Moxley, [1936] 1 All E. R. 64; 80 S. J. 128	125
Mutton v. Peat, [1900] 2 Ch. 79; 69 L. J. Ch. 484; 82 L. T. 440; 48 W. R. 486	178
Muttyloll Seal v. Dent (1853), 8 Moo. P. C. 319; 5 Moo. Ind. App. 328; 97 R. R. 52... ..	184
Mutual Aid Building Society, <i>Re</i> (1883), 49 L. T. 530	117
Mutual Life Ass. Co. v. New York Ins. Co. (1896), 75 L. T. 528; 13 T. L. R. 32	19
Myers v. Elman, [1940] A. C. 282; 109 L. J. K. B. 105; 162 L. T. 113; 56 T. L. R. 177; [1939] 4 All E. R. 484	212
— v. Rothfield (1938), 54 T. L. R. 1045; [1938] 3 All E. R. 498	99
— v. Watson (1851), 1 Sim. (N.S.) 523; 89 R. R. 173	200
— v. Willis (1856), 18 C. B. 886; 25 L. J. C. P. 255; 2 Jur. 788; 27 L. T. 238; 4 W. R. 637; 104 R. R. 610	65
Mynn v. Joliffe (1834), 1 M. & Rob. 326; 42 R. R. 802	52
NANT-Y-GLO IRON Co. v. Grave (1878), 12 Ch. D. 738; 38 L. T. 345; 26 W. R. 504... ..	113
Naoraji v. Bank of India (1868), L. R. 3 C. P. 444; 37 L. J. C. P. 221; 18 L. T. 358; 16 W. R. 791	282
Nash v. Dix (1898), 78 L. T. 445	200
Natal Land, etc. Co. v. Pauline, etc. Syndicate, [1904] A. C. 120; 73 L. J. P. C. 22; 89 L. T. 678; 11 Manson, 29	35
National Bolivian Navigation Co. v. Wilson (1880), 5 App. Cas. 176, 209	168
National Coffee Palace Co., <i>Re</i> (1883), 24 Ch. D. 367; 53 L. J. Ch. 57; 50 L. T. 38; 32 W. R. 236	254
National Employers' Mutual General Insurance Association, Ltd. v. Elphinstone, [1929] W. N. 135	116
National Exchange Co. v. Drew (1855), 2 Macq. 103; 25 L. T. 223; 149 R. R. 127... ..	211
National Funds Ass. Co., <i>Re</i> (1878), 10 Ch. D. 118; 48 L. J. Ch. 163; 39 L. T. 420; 27 W. R. 302	268
National Mercantile Bank v. Rymill (1881), 44 L. T. 767	272
Navulshaw v. Brownrigg (1852), 2 D. M. & G. 441; 21 L. J. Ch. 908; 95 R. R. 156... ..	91, 180
Nayler v. Yearsley (1860), 2 F. & F. 41; 121 R. R. 781	124
Naylor v. Mangles (1794), 1 Esp. 109; 5 R. R. 722	147
Neale v. Gordon-Lennox, [1902] A. C. 465; 71 L. J. K. B. 939; 87 L. T. 341; 51 W. R. 140; 66 J. P. 757	62, 75
Near East Relief v. King, [1930] 2 K. B. 40; 99 L. J. K. B. 522; 35 Com. Cas. 104... ..	160, 161
Neck, <i>Ex p.</i> (1884), 13 Q. B. D. 740; 54 L. J. Q. B. 79; 51 L. T. 388; 32 W. R. 912... ..	229
Negus v. Forster (1882), 46 L. T. 675; 30 W. R. 671	23, 24
Neilson v. James (1862), 9 Q. B. D. 546; 51 L. J. Q. B. 369; 46 L. T. 791	98, 110
Nelson v. Aldridge (1818), 2 Stark. 435; 20 R. R. 709	62, 106
— v. Powell (1784), 3 Doug. 410	198
Neptune, <i>The</i> (1824), 1 Hag. Adm. 227	155
Nesbitt, <i>Ex p.</i> (1805), 2 Sch. & Lef. 279	157
Nevill, <i>Re</i> (1870), L. R. 6 Ch. 397; 40 L. J. Bk. 73; 24 L. T. 45; 19 W. R. 488.....	3
— v. Fine Arts Ins. Co., [1895] 2 Q. B. 156; 64 L. J. Q. B. 681; 72 L. T. 525	217
Neville, <i>Ex p.</i> (1868), L. R. 4 Ch. 43	76, 133
New Brunswick Ry. v. Conybeare (1862), 9 H. L. Cas. 711; 31 L. J. Ch. 297; 6 L. T. 109	175
New Zealand and Australian Land Co. v. Watson (1881), 7 Q. B. D. 374; 50 L. J. Q. B. 433; 44 L. T. 675; 29 W. R. 694	71, 72, 161, 204
Newall v. Tomlinson (1871), L. R. 6 C. P. 405; 25 L. T. 382	257
Newbiggin Gas Co. v. Armstrong (1879), 13 Ch. D. 310; 49 L. J. Ch. 231	252

	PAGE
Newen, <i>Re</i> , [1903] 1 Ch. 812; 72 L. J. Ch. 356; 88 L. T. 264; 51 W. R. 297	63, 71
Newlands v. Nat. Employers' Acc. Assn. (1885), 54 L. J. Q. B. 428; 53 L. T. 242; 49 J. P. 628	175
Newman, <i>Re</i> , [1916] 2 Ch. 309; 85 L. J. Ch. 625; 115 L. T. 134	130
Newport v. Pougher, [1937] Ch. 214; 106 L. J. Ch. 166; 156 L. T. 181; 81 S. J. 78; 53 T. L. R. 291; [1937] 1 All E. R. 276	154
Newsholme v. Road Transport Co., [1929] 2 K. B. 356; 98 L. J. K. B. 751; 141 L. T. 570; 45 T. L. R. 573	174, 222, 225
Newsom v. Thornton (1805), 6 East, 17; 2 Smith, 207; 8 R. R. 378	60
Newton v. Chambers (1844), 1 D. & L. 869; 13 L. J. Q. B. 141	239
Nicholls v. Diamond (1853), 9 Ex. 154; 23 L. J. Ex. 1; 96 R. R. 631	242
— v. Knapman (1910), 102 L. T. 306; 26 T. L. R. 356	13
— v. Wilson (1843), 11 M. & W. 106; 12 L. J. Ex. 266; 63 R. R. 523	100, 133
Nicholson, <i>Re</i> (1883), 53 L. J. Ch. 302; 49 L. T. 811; 32 W. R. 296	162
— v. Chapman (1793), 2 H. Bl. 254; 3 R. R. 374	15
— v. Mansfield (1901), 17 T. L. R. 259	145
Nickalls v. Merry (1875), L. R. 7 H. L. 530; 45 L. J. Ch. 575; 23 W. R. 663	193
Nickolson v. Knowles (1820), 5 Madd. 47; 21 R. R. 276	80, 164
Nickson v. Brohan (1718), 10 Mod. 109	167
Nielans v. Cuthbertson (1891), 7 T. L. R. 516	128
Nightingale v. Parsons, [1914] 2 K. B. 621; 83 L. J. K. B. 742; 110 L. T. 806	121
Nireaha Tamaki v. Baker, [1901] A. C. 561; 70 L. J. P. C. 66; 84 L. T. 633	269
Nitedals Taendstikfabrik v. Bruster, [1906] 2 Ch. 671; 22 T. L. R. 724; 75 L. J. Ch. 798	134
Nitrate Producers' Co. v. Wills (1905), 21 T. L. R. 699	103, 106
Niven v. Greaves (1890), 54 J. P. 548	288
Noah v. Owen (1886), 2 T. L. R. 364	130
Nobel's Explosives Co. v. Jones (1882), 8 App. Cas. 5; 52 L. J. Ch. 339; 31 W. R. 388; 48 L. T. 490	268
Noble v. Nat. Discount Co. (1860), 5 H. & N. 225; 29 L. J. Ex. 210; 120 R. R. 552	259
Nocton v. Ashburton, [1914] A. C. 932; 83 L. J. Ch. 784; 111 L. T. 641; 30 T. L. R. 602	109
Nordman v. Rayner (1916), 33 T. L. R. 87	275
Norey v. Keep, [1909] 1 Ch. 561; 78 L. J. Ch. 334; 100 L. T. 322; 25 T. L. R. 289	7
Norfolk v. Worthy (1808), 1 Camp. 337; 10 R. R. 749	187
Norreys v. Hodgson (1897), 13 T. L. R. 421	96
Norris, Cottle (1850), 2 H. L. C. 647; 81 R. R. 345	16
North v. Loomes, [1919] 1 Ch. 378; 88 L. J. Ch. 217; 120 L. T. 533	64
North's Case (1557), Dy. 161 a.	116
North Australian Territory Co., <i>Re</i> , [1902] 1 Ch. 322; 65 L. T. 800; 8 T. L. R. 90 ...	96
North Eastern Ry. v. Jackson (1870), 19 W. R. 198	96
North and South Wales Bank v. Macbeth; Same v. Irvine, [1908] A. C. 137; 77 L. J. K. B. 464; 98 L. T. 470; 24 T. L. R. 397	271
North Sydney Investment Co. v. Higgins, [1899] A. C. 263; 68 L. J. P. C. 42; 80 L. T. 303; 47 W. R. 481; 6 Manson, 321	35
North Western Bank v. Poynter, [1895] A. C. 56; 64 L. J. P. C. 27; 72 L. T. 93 ...	163
Northern Counties Assn. Co. v. Whipp (1884), 26 Ch. D. 482; 53 L. J. Ch. 629; 51 L. T. 806; 32 W. R. 626	176
Northey v. Trevillion (1902), 7 Com. Cas. 201	128, 274
Northumberland Avenue Hotel, <i>Re</i> (1886), 33 Ch. D. 16; 54 L. T. 777	35
Norton v. Fazan (1798), 1 B. & P. 226; 4 R. R. 785	28
— v. Herron (1825), 1 C. & P. 648; R. & M. 229; 28 R. R. 797	244
Nosotti v. Auerbach (1898), 79 L. T. 413; 15 T. L. R. 140	124
Nottingham Bank, <i>Ex p.</i> (1885), 15 Q. B. D. 441; 54 L. J. Q. B. 601	228
Nouvelles Huileries Anversoises v. Mann (1924), 40 T. L. R. 804	3

Nurse <i>v.</i> Durnford (1879), 13 Ch. D. 764; 49 L. J. Ch. 229; 41 L. T. 611; 28 W. R. 145	252
Nutt <i>v.</i> Easton, [1900] 1 Ch. 29; 69 L. J. Ch. 46; 81 L. T. 530	85
OAKES <i>v.</i> Turquand (1867), L. R. 2 H. L. 325; 36 L. J. Ch. 949; 16 L. T. 808	199
Oates <i>v.</i> Hudson (1851), 6 Ex. 346; 20 L. J. Ex. 284; 86 R. R. 326	256
O'Brien <i>v.</i> Lewis (1863), 32 L. J. Ch. 569; 8 L. T. 179; 11 W. R. 318; 141 R. R. 178	90, 100
Ocean, etc. Ins. Assn. <i>v.</i> Leslie (1889), 22 Q. B. D. 722; 57 L. T. 722	187
Odell <i>v.</i> Cormack (1887), 19 Q. B. D. 223	47
Odessa Tram. Co. <i>v.</i> Mendel (1877), 8 Ch. D. 235; 47 L. J. Ch. 505; 38 L. T. 731; 26 W. R. 887	232
Oelkers <i>v.</i> Ellis, [1914] 2 K. B. 139; 83 L. J. K. B. 658; 110 L. T. 332	84
Official Receiver, <i>Ex p.</i> , <i>Re</i> Mander (1902), 86 L. T. 234	281
Ogden <i>v.</i> Hall (1879), 40 L. T. 751	245
Ogilvie <i>v.</i> Currie (1868), 37 L. J. Ch. 541; 18 L. T. 593; 16 W. R. 769	199
Ogle <i>v.</i> Story (1833), 2 L. J. K. B. 110; 4 B. & Ad. 735; 1 N. & M. 474	162
Oglesby <i>v.</i> Yglesias (1858), E. B. & E. 930; 27 L. J. Q. B. 356; 113 R. R. 949	240
Okell <i>v.</i> Charles (1876), 34 L. T. 822	190, 242
Old Gate Estates, Ltd. <i>v.</i> Toplis & Harding, [1939] 3 All E. R. 209; 161 L. T. 227...	77
Olding <i>v.</i> Smith (1852), 16 Jur. 497	172, 220
Oliver <i>v.</i> Court (1820), Dan. 301; 8 Price 127; 22 R. R. 720	85, 99
Olivier, The (1862), 31 L. J. Ad. 137	66
Olympic Reinsurance Co., <i>Re</i> , [1920] 2 Ch. 341; 89 L. J. Ch. 544; 123 L. T. 786; 36 T. L. R. 691	277
Omnium Electric Palaces <i>v.</i> Baines, [1914] 1 Ch. 332; 83 L. J. Ch. 372; 109 L. T. 964; 30 T. L. R. 213; 21 Manson, 94	95
Onward, The (1873), L. R. 4 Ad. 38; 42 L. J. Ad. 61; 28 L. T. 204; 21 W. R. 601...	67
Oom <i>v.</i> Bruce (1810), 12 East, 225; 11 R. R. 367	261
Oppenheimer <i>v.</i> Attenborough, [1908] 1 K. B. 221; 77 L. J. K. B. 209; 98 L. T. 94; 24 T. L. R. 115	182
— <i>v.</i> Frazer, [1907] 2 K. B. 50; 76 L. J. K. B. 806; 97 L. T. 3; 12 Com. Cas. 289; 23 T. L. R. 410	180
Oriental, The, [1895] P. 49; 64 L. J. P. 32; 71 L. T. 711; 11 T. L. R. 116	155
Oriental Bank, <i>Ex p.</i> (1870), L. R. 5 Ch. 358; 39 L. J. Ch. 588; 22 L. T. 422; 18 W. R. 474	227
Ormerod <i>v.</i> Tate, (1801), 1 East, 464; 6 R. R. 327	153, 154
Ormiston <i>v.</i> G. W. Ry., [1917] 1 K. B. 598; 86 L. J. K. B. 769; 116 L. T. 479; 33 T. L. R. 171	216
O'Sullivan <i>v.</i> Thomas, [1895] 1 Q. B. 698; 64 L. J. Q. B. 398; 72 L. T. 285; 43 W. R. 269; 11 T. L. R. 225	284
Ottaway <i>v.</i> Hamilton (1878), 3 C. P. D. 393; 47 L. J. C. P. 725; 38 L. T. 925; 26 W. R. 783	25, 26
Ottley <i>v.</i> Gilby (1845), 8 Beav. 602; 14 L. J. Ch. 177; 68 R. R. 218	99
Ottos Kopje Diamond Mines, <i>Re</i> , [1893] 1 Ch. 618; 62 L. J. Ch. 166; 68 L. T. 138; 41 W. R. 258	173
Oursell, <i>Ex p.</i> (1756), AmbL. 297	230
Overend <i>v.</i> Gibb (1872), L. R. 5 H. L. 480; 42 L. J. Ch. 67	106
Overton <i>v.</i> Hewett (1887), 3 T. L. R. 246	19, 249
Overweg, <i>Re</i> , [1900] 1 Ch. 209; 69 L. J. Ch. 255; 81 L. T. 776	74, 140, 141, 279
Owen <i>v.</i> Cronk, (1895) 1 Q. B. 265; 64 L. J. Q. B. 288	255
— <i>v.</i> Gooch (1797), 2 Esp. 567	237, 247
— <i>v.</i> Henshaw (1877), 7 Ch. D. 385; 47 L. J. Ch. 267; 26 W. R. 188	162

	PAGE
Owen v. Ord (1828), 3 C. & P. 349.....	31
Owens, <i>Re</i> (1873), 7 Ir. R. Eq. 235, 424	132
Oxenham v. Esdaile (1828), 2 Y. & J. 493	157
— v. Smythe (1861), 6 H. & N. 690; 31 L. J. Ex. 110	249
Oxford v. Crow, [1893] 3 Ch. 535; 69 L. T. 228; 42 W. R. 200	41
Oxford Building Soc., <i>Re</i> (1886), 35 Ch. D. 502; 56 L. J. Ch. 98; 55 L. T. 598; 35 W. R. 116; 3 T. L. R. 46	95, 105
 PADDON, <i>Ex p.</i> (1893), 9 T. L. R. 166	104, 143
Padget v. Priest (1787), 2 T. R. 97; 1 R. R. 440	256, 268
Padwick v. Hurst (1854), 18 Beav. 575; 23 L. J. Ch. 657	165
— v. Stanley (1852), 9 Hare, 627; 16 Jur. 586	91, 165
Page v. Defries (1866), 7 B. & S. 137; 147 R. R. 376	208
Paice v. Walker (1870), L. R. 5 Ex. 173; 39 L. J. Ex. 109; 22 L. T. 547; 18 W. R. 789	243, 244, 245
Painter v. Abil (1863), 2 H. & C. 113; 33 L. J. Ex. 60; 9 Jur. 549; 8 L. T. 287; 11 W. R. 651; 133 R. R. 599	177
Paletthorp v. Furnish (1796), 2 Esp. 511, n.	220
Palk v. Force (1848), 12 Q. B. 666; 17 L. J. Q. B. 299	131
Palmer v. Day, [1895] 2 Q. B. 618; 64 L. J. Q. B. 807; 44 W. R. 14; 11 T. L. R. 565	282
— v. Goodwin (1862), 13 Ir. Ch. R. 171	132
— v. Hutchinson (1881), 6 App. Cas. 619; 50 L. J. P. C. 62; 45 L. T. 180	234
Panama, The (1870), L. R. 3 P. C. 199; 39 L. J. Ad. 37	66
Panama Telegraph Co. v. India Rubber, <i>etc.</i> Co. (1875), L. R. 10 Ch. 515; 45 L. J. Ch. 121; 32 L. T. 517; 23 W. R. 583	232
Panmure, <i>Ex p.</i> (1883), 24 Ch. D. 367; 53 L. J. Ch. 57; 50 L. T. 38; 32 W. R. 236	254
Pannell v. Hurley (1845), 2 Colly. 241; 70 R. R. 193	273
Panthca, The (1871), 25 L. T. 389	156
Papè v. Westacott, [1894] 1 Q. B. 272; 63 L. J. Q. B. 222; 70 L. T. 18; 42 W. R. 131; 10 T. L. R. 51	47, 75, 105
Papillon v. Brunton (1860), 5 H. & N. 518; 29 L. J. Ex. 265; 120 R. R. 704	53
Pappa v. Rose (1872), L. R. 7 C. P. 32, 525; 41 L. J. C. P. 11, 187; 25 L. T. 466; 27 L. T. 348; 20 W. R. 62, 784	77
Paquin v. Beauclerk, [1906] A. C. 148; 75 L. J. K. B. 395; 94 L. T. 350; 54 W. R. 521; 22 T. L. R. 395	239
Parfitt v. Lawless (1872), L. R. 2 P. 462; 41 L. J. P. 68; 27 L. T. 215; 21 W. R. 200	90
Pariente v. Lubbock (1855), 8 D. M. & G. 5; 20 Beav. 588; 114 R. R. 1	51, 74, 103
Paris, The, [1896] P. 77; 65 L. J. P. 42; 73 L. T. 738	153
Park v. Hammond (1816), 6 Taunt. 495; 2 Marsh. 189; 4 Camp. 344; Holt, 80; 16 R. R. 658	106
Parke v. Eliason (1801), 1 East, 544	230
Parker (Harry), Ltd. v. Mason, [1940] 2 K. B. 590; 57 T. L. R. 35; [1940] 4 All E. R. 199	91
—, <i>Re</i> (1882), 21 Ch. D. 408; 52 L. J. Ch. 159; 47 L. T. 633; 31 W. R. 212	142
— v. Beasley (1814), 2 M. & S. 423; 15 R. R. 299	138
— v. Ibbetson (1858), 4 C. B. 346; 27 L. J. C. P. 236; 114 R. R. 752	118
— v. M'Kenna (1874), L. R. 10 Ch. 96; 44 L. J. Ch. 425; 31 L. T. 739; 23 W. R. 271	84, 92, 93
— v. Miller (1926), 42 T. L. R. 408	207
— v. Rolls (1854), 14 C. B. 691; 98 R. R. 822	79
— v. Smith (1812), 16 East, 382; 14 R. R. 366	138
— v. Winlow (1857), 7 E. & B. 942; 27 L. J. Q. B. 49; 110 R. R. 904	245
Parkes v. Prescott (1869), L. R. 4 Ex. 169; 38 L. J. Ex. 105; 20 L. T. 537; 17 W. R. 773	206

	PAGE
<i>Parkins v. Hawkshaw</i> (1814), 2 Stark. 239; 19 R. R. 711	221
<i>Parkinson v. Hanbury</i> (1867), L. R. 2 H. L. 1; 36 L. J. Ch. 292; 16 L. T. 243; 15 W. R. 642	91
<i>Parratt v. Parratt</i> (1848), 17 L. J. Ch. 346; 2 De G. & Sm. 258; 12 Jur. 740; 79 R. R. 204	100
<i>Parsons v. Dewsbury</i> (1887), 3 T. L. R. 354	99
— <i>v. New Zealand S. Co.</i> , [1901] 1 K. B. 548; 70 L. J. K. B. 404; 84 L. T. 218; 49 W. R. 355; 6 Com. Cas. 41; 9 Asp. M. C. 170	239
— <i>v. Thompson</i> (1790), 1 H. Bl. 322; 2 R. R. 773	131
<i>Partington, Re, Partington v. Allen</i> (1887), 57 L. T. 654; 4 T. L. R. 4	109
— <i>v. Hawthorne</i> (1888), 52 J. P. 807	195
<i>Parton v. Crofts</i> (1864), 16 C. B. 11; 33 L. J. C. P. 189; 10 L. T. 34; 12 W. R. 553; 139 R. R. 387	61
<i>Passingham v. King</i> (1898), 14 T. L. R. 392	125
<i>Patent Floor Cloth Co., Re</i> (1872), 41 L. J. Ch. 476; 26 L. T. 467	129
<i>Paterson v. Gandasqui</i> (1812), 15 East, 62; 13 R. R. 368	188, 195
— <i>v. Tash, Str.</i> 1178	60
<i>Patten v. Hamilton</i> , [1911] 1 Ir. R. 46	93
— <i>v. Rea</i> (1857), 2 C. B. 606; 26 L. J. C. P. 235; 109 R. R. 800	211
<i>Pauli, Ex p.</i> (1839), 3 Dea. 169; 2 Jur. 208	230
<i>Pavy's Felted Fabric Co., Re</i> (1876), 1 Ch. D. 631; 45 L. J. Ch. 318; 24 W. R. 507... ..	148
<i>Pawle v. Gunn</i> (1838), 4 Bing. N. C. 445; 6 Scott, 286; 1 Arn. 200; 7 L. J. C. P. 206; 44 R. R. 755	135
<i>Pawle's Case</i> (1869), L. R. 4 Ch. 497; 38 L. J. Ch. 412	199
<i>Payne, Re, Young v. Payne</i> , [1904] 2 Ch. 608; 73 L. J. Ch. 849; 91 L. T. 777; 11 Manson, 437; 20 T. L. R. 590	171, 225
— <i>v. Leonfield</i> (1882), 51 L. J. Q. B. 642; 30 W. R. 814	62
<i>Payne-Collier, Ex p.</i> , [1891] 1 Ch. 590; 60 L. J. Ch. 525; 64 L. T. 605; 39 W. R. 417; 7 T. L. R. 262	151, 163
<i>Peacock v. Freeman</i> (1888), 4 T. L. R. 541	124, 127
<i>Pearce v. Rogers</i> (1800), 3 Esp. 214	174
<i>Pearse v. Boulter</i> (1860), 2 F. & F. 133; 121 R. R. 782	54
— <i>v. Green</i> (1819), 1 Jac. & W. 135; 20 R. R. 258	76, 115
<i>Pearks, Gunston & Tee, Ltd. v. Ward</i> , [1902] 1 K. B. 1; 71 L. J. K. B. 656; 87 L. T. 51	289
<i>Pearson, Re</i> , [1899] 2 Q. B. 618; 68 L. J. Q. B. 878; 81 L. T. 289; 48 W. R. 154; 63 J. P. 677	53
— <i>v. Benson</i> (1860), 28 Beav. 598; 126 R. R. 259	89
— <i>v. Cardon</i> (1831), 2 Russ. & M. 606; 4 Sim. 218	165
— <i>v. Dublin Corp.</i> , [1907] A. O. 351; 77 L. J. P. C. 1; 97 L. T. 645	211, 212
— <i>v. Götschen</i> (1864), 17 C. B. 352; 33 L. J. C. P. 265; 10 Jur. 903; 10 L. T. 758; 12 W. R. 1118; 142 R. R. 390	68
— <i>v. Graham</i> (1837), 6 A. & E. 899; 2 N. & P. 636; 7 L. J. Q. B. 247; 45 R. R. 644	271, 281
— <i>v. Scott</i> (1878), 9 Ch. D. 198; 47 L. J. Ch. 705; 26 W. R. 796; 38 L. T. 747... ..	47, 61, 192
<i>Pearson's Case</i> (1877), 5 Ch. D. 336; 46 L. J. Ch. 339; 25 W. R. 618	113
<i>Pearson's Exors.' Case</i> (1852), 3 De G. M. & G. 241	16
<i>Peat v. Clayton</i> , [1906] 1 Ch. 659; 75 L. J. Ch. 344; 94 L. T. 465; 54 W. R. 416; 22 T. L. R. 312; 13 Manson, 117	166
<i>Peatfield v. Barlow</i> (1869), L. R. 8 Eq. 61; 38 L. J. Ch. 310	155
<i>Peele v. Northcote</i> (1817), 7 Taunt. 478; 1 Moo. 178; 18 R. R. 549	138
<i>Peers v. Sneyd</i> (1853), 17 Beav. 151; 99 R. R. 78	53
<i>Pelham v. Hilder</i> (1841), 1 Y. & Col. C. C. 3; 57 R. R. 208	58
<i>Pelly v. Wathen</i> (1849), 18 L. J. Ch. 281; 21 L. J. Ch. 105; 7 Hare, 351; 1 D. M. & G. 16; 4 Jur. 9; 91 R. R. 7	151, 157
<i>Pemberton, Ex p.</i> (1810), 18 Ves. 282	152
— <i>Re</i> (1840), Mont. & Ch. 667; 4 Dea. 294	85, 98, 233

	PAGE
Penkivil v. Connell (1850), 5 Ex. 381; 19 L. J. Ex. 305.....	243
Pennell v. Stephens (1849), 7 C. B. 987; 18 L. J. C. P. 291; 78 R. R. 893	224
Penny v. Wimbledon U. D. C., [1899] 2 Q. B. 72; 68 L. J. Q. B. 704; 80 L. T. 615; 47 W. R. 565; 63 J. P. 406; 15 T. L. R. 348	6
Peppercorne v. Clench (1872), 26 L. T. 656	139
Percy v. Glasgow Corp., [1922] 2 A. C. 299; 91 L. J. P. C. 187; 127 L. T. 501; 38 T. L. R. 722	216
Performing Right Soc., Ltd. v. Mitchell, etc., Ltd., [1924] 1 K. B. 762; 93 L. J. K. B. 306; 131 L. T. 243; 40 T. L. R. 308	2
Perkins v. Smith (1752), 1 Wils. 328	268
Perry v. Barnett (1885), 15 Q. B. D. 388; 54 L. J. Q. B. 466; 53 L. T. 585; 34 W. R. 154; 1 T. L. R. 580	140
— v. Holl (1860), 2 D. F. & J. 38; 29 L. J. Ch. 677; 8 W. R. 570; 2 L. T. 259, 585; 128 R. R. 56; 2 Giff. 138	49
Perry's Case (1876), 34 L. T. 716	116
Perry-Horrick v. Atwood (1857), 27 L. J. Ch. 121; 2 De G. & J. 21; 4 Jur. 101; 119 R. R. 10	176
Petch v. Lyon (1846), 9 Q. B. 147; 15 L. J. Q. B. 393; 72 R. R. 205	221
Peterson v. Ayre (1853), 13 C. B. 353; 93 R. R. 573	236
Peto v. Blades (1814), 5 Taunt. 657; 15 R. R. 609	267
— v. Hague (1804), 5 Esp. 134	219
Pettman v. Koble (1850), 9 C. B. 701; 19 L. J. C. P. 325	137
Petty v. Anderson (1825), 3 L. J. (o.s.) C. P. 223; 3 Bing. 170; 10 Moo. 577; 2 C. & P. 38	186
Pharmaceutical Soc. v. London and Provincial Supply Assoen. (1880), 5 App. Cas. 857; 49 L. J. Q. B. 736; 43 L. T. 389; 28 W. R. 957	288
Phelps v. Lyle (1840), 10 A. & E. 113; 2 P. & D. 314; 8 L. J. Q. B. 236; 50 R. R. 353	281
— v. Prothero (1855), 16 C. B. 370; 24 L. J. C. P. 225; 100 R. R. 763; 1 Jur. 1170... ..	186
— v. Upton Snodsbury Highway Board (1885), 1 T. L. R. 425.....	32
Philip v. Bennett (1901), 18 T. L. R. 129	143, 144
Phillipps v. Briard (1856), 25 L. J. Ex. 233	118
Phillips, <i>Ex p.</i> (1861), 2 D. F. & J. 634; 30 L. J. Bk. 1; 6 Jur. (N.S.) 1273; 3 L. T. 516; 9 W. R. 131	143
— v. Hull Alhambra, [1901] 1 K. B. 59; 70 L. J. K. B. 26; 83 L. T. 431; 49 W. R. 223	129, 280
— v. Jones (1888), 4 T. L. R. 401	279
— v. Phillips (1852), 9 Hare, 471; 22 L. J. Ch. 141	91
Phillipson v. Hayter (1870), L. R. 6 C. P. 38; 40 L. J. C. P. 14; 23 L. T. 556; 19 W. R. 130	20—22
Phosphate of Lime Co. v. Green (1871), L. R. 7 C. P. 43; 25 L. T. 636	41
Phosphate Sewage Co. v. Hartmont (1877), 5 Ch. D. 394, 448	112
Pickering's Claim (1871), L. R. 6 Ch. 525	189
Pickering v. Busk (1812), 15 East, 38; 13 R. R. 364	16
— v. Ely (1843), 2 Y. & Coll. C. C. 249; 12 L. J. Ch. 271; 7 Jur. 479; 60 R. R. 132... ..	19
Pickernell v. Jauberry (1862), 3 F. & F. 217; 130 R. R. 834	68
Pierson v. Knutsford Estates (1884), 13 Q. B. D. 666; 53 L. J. Q. B. 181; 32 W. R. 451	153
Pigott v. Thompson (1802), 3 B. & P. 147.....	263
Pike v. Ongley (1887), 18 Q. B. D. 708; 56 L. J. Q. B. 373; 35 W. R. 534; 3 T. L. R. 549	247
— v. Stephens (1848), 12 Q. B. 465; 17 L. J. Q. B. 282; 76 R. R. 316	224
Pilcher v. Arden (1877), 7 Ch. D. 318; 47 L. J. Ch. 479; 38 L. T. 111	153
Pillott v. Wilkinson (1864), 3 H. & C. 345; 34 L. J. Ex. 22	272
Pilot v. Graze (1888), 52 J. P. 311; 4 T. L. R. 453	16
Pinkerton, <i>Re</i> (1873), L. R. 16 Eq. 490; 42 L. J. Ch. 878; 29 L. T. 364; 21 W. R. 943	152

	PAGE
<i>Pinner v. Knights</i> (1843), 6 Beav. 174	31
<i>Pinto v. Santos</i> (1814), 1 Marsh. 132; 5 Taunt. 447	72
<i>Pisani v. Gibraltar</i> (1874), L. R. 5 P. C. 516	89, 101
<i>Pitman and Edwards, Ex p.</i> (1879), 12 Ch. D. 707; 27 W. R. 445; 40 L. T. 569	55
<i>Pitman v. Francois</i> (1884), 1 C. & E. 355	108
<i>Pitt, Ex p.</i> (1923), 40 T. L. R. 5	236
— <i>v. Yalden</i> , 4 Burr. 2060	108
<i>Platt v. Depree</i> (1893), 9 T. L. R. 194	125
— <i>v. Rowe</i> (1909), 26 T. L. R. 49	93
<i>Plimmer v. Sells</i> (1834), 3 N. & M. 422	223
<i>Plumb v. Cobden Flour Mills Co., Ltd.</i> , [1914] A. C. 62; 83 L. J. K. B. 197; 109 L. T. 759; 30 T. L. R. 174	209
<i>Plumpton v. Burkinshaw</i> , [1908] 2 K. B. 572; 77 L. J. K. B. 961; 99 L. T. 415	12
<i>Pocahontas Fuel Co. v. Ambatielos</i> (1922), 27 Com. Cas. 148	66
<i>Poirier v. Morris</i> (1853), 2 E. & B. 89; 22 L. J. Q. B. 313; 95 R. R. 449	56, 57
<i>Poland v. Parr</i> , [1927] 1 K. B. 236; 96 L. J. K. B. 152; 136 L. T. 271	211
<i>Pole v. Leask</i> (1860), 28 Beav. 562; 29 L. J. Ch. 888; (1862), 33 L. J. Ch. 155; 9 Jur. 829; 8 L. T. 645	11, 15, 40, 51, 284
<i>Polemis and Furness Withy & Co., Ltd.</i> , [1921] 3 K. B. 560; 90 L. J. K. B. 1353; 126 L. T. 154; 37 T. L. R. 940; 27 Com. Cas. 25	109
<i>Polhill v. Walter</i> (1832), 3 B. & Ad. 114; 1 L. J. K. B. 92; 37 R. R. 344	190, 241, 249
<i>Police (Comms.) v. Cartman</i> , [1896] 1 Q. B. 655; 65 L. J. M. C. 113; 74 L. T. 726; 60 J. P. 357; 12 T. L. R. 334; 44 W. R. 637	287
<i>Pollard v. Bank of England</i> (1871), L. R. 6 Q. B. 623; 40 L. J. Q. B. 233; 25 L. T. 415	81
<i>Pollitt, Re</i> , [1893] 1 Q. B. 455; 62 L. J. Q. B. 236; 68 L. T. 366; 41 W. R. 276; 9 T. L. R. 195	281
<i>Pollock v. Stables</i> (1848), 12 Q. B. 765; 17 L. J. Q. B. 352; 76 R. R. 419; 12 Jur. 1043; 5 Rail. Cas. 352	58, 139
<i>Ponsolle v. Webber</i> , [1908] 1 Ch. 254; 77 L. J. Ch. 253; 98 L. T. 375	194
<i>Pool v. Pool</i> (1889), 58 L. J. P. 67; 61 L. T. 401	280
<i>Pooley, Re</i> (1882), 20 Ch. D. 685; 51 L. J. Ch. 810; 47 L. T. 177; 30 W. R. 650	152
— <i>v. Whetham</i> (1886), 2 T. L. R. 808	89
<i>Poppleton, Ex p.</i> (1891), 63 L. T. 839; 39 W. R. 384	230
<i>Portalis v. Tetley</i> (1867), L. R. 5 Eq. 140; 37 L. J. Ch. 139; 17 L. T. 344	181
<i>Porter v. Fraser</i> (1912), 29 T. L. R. 91	252
<i>Portugal (Queen of) v. Glyn</i> (1837), 7 C. & F. 466	266
<i>Portuguese Copper Mines, Re</i> (1890), 45 Ch. D. 16; 62 L. T. 179; 63 L. T. 423; 39 W. R. 25; 2 Meg. 249	39
<i>Pott v. Bevan</i> (1844), 1 C. & K. 335	40
<i>Poulton v. L. & S. W. Ry.</i> (1867), L. R. 2 Q. B. 534; 36 L. J. Q. B. 294; 8 B. & S. 616; 17 L. T. 11	4, 46, 216
<i>Pow v. Davis</i> (1861), 1 B. & S. 220; 30 L. J. Q. B. 257; 4 L. T. 399; 9 W. R. 611; 7 Jur. 1011; 124 R. R. 530	254
<i>Powell v. Browne</i> (1908), 97 L. T. 854; 24 T. L. R. 71	176
— <i>v. Hoyland</i> (1851), 6 Ex. 67; 20 L. J. Ex. 82; 86 R. R. 193	270
— <i>v. Jones</i> , [1905] 1 K. B. 11; 74 L. J. K. B. 115; 92 L. T. 430; 53 W. R. 277; 21 T. L. R. 55; 10 Com. Cas. 36	72, 93, 114
— <i>v. Powell</i> , [1900] 1 Ch. 243; 69 L. J. Ch. 164; 82 L. T. 84	101
— <i>v. Smith</i> (1872), L. R. 14 Eq. 85; 41 L. J. Ch. 734; 20 W. R. 602	39
<i>Power v. Butcher</i> (1829), 5 M. & R. 327; 10 B. & C. 329; 8 L. K. J. B. 217; 34 R. R. 432	166
— <i>v. Power</i> (1884), 13 L. R. Ir. 281	77
<i>Powles v. Page</i> (1846), 15 L. J. C. P. 217; 3 C. B. 16; 71 R. R. 262	226
<i>Prager v. Blatspiel</i> , [1924] 1 K. B. 566; 93 L. J. K. B. 410; 130 L. T. 672; 68 S. J. 460; 40 T. L. R. 287	15
<i>Pratt v. Patrick</i> , [1924] 1 K. B. 488; 93 L. J. K. B. 174; 130 L. T. 735; 68 S. J. 276; 40 T. L. R. 167	207

	PAGE
Pratt v. Vizard (1833), 3 L. J. K. B. 7; 5 B. & Ad. 808; 2 N. & M. 455; 39 R. R. 660	157
— <i>v. Willey</i> (1826), 2 C. & P. 350	198
Precious v. Abel (1795), 1 Esp. 350	17
Prees v. Coke (1871), L. R. 6 Ch. 645	101
Préfontaine v. Grenier , [1907] A. C. 101; 76 L. J. P. C. 4; 95 L. T. 623; 23 T. L. R. 27	105, 107
Prescott v. Flynn (1832), 9 Bing. 19; 2 M. & Scott, 18; 1 L. J. C. P. 145; 35 R. R. 508	17
Preston v. Etherington (1887), 4 T. L. R. 47	116
— <i>v. L. M. & N. Ry.</i> (1856), 5 H. L. C. 605; 25 L. J. Ch. 421; 4 W. R. 383; 101 R. R. 287	36
Prestwich v. Poley (1865), 18 C. B. 806; 34 L. J. C. P. 189; 12 L. T. 390; 11 Jur. 583; 13 W. R. 753; 144 R. R. 683	63
Pretty v. Fowke (1887), 3 T. L. R. 845	109
Price, Re (1845), 9 Beav. 234	64
— <i>v. Crouch</i> (1891), 60 L. J. Q. B. 767	154
— <i>v. Metro. House Investment Co.</i> (1907), 23 T. L. R. 630	133
— <i>v. Smith</i> (1929), 141 L. T. 490; 45 T. L. R. 542	126
— <i>v. Taylor</i> (1860), 5 H. & N. 540; 29 L. J. Ex. 331; 2 L. T. 221; 8 W. R. 419; 120 R. R. 715	242
Prickett v. Badger (1856), 1 C. B. (N.S.) 296; 26 L. J. C. P. 33; 107 R. R. 668	127
Priddy v. Rose (1817), 3 Mer. 86; 17 R. R. 24	260
Priestley v. Fernie (1865), 3 H. & C. 977; 34 L. J. Ex. 172; 13 L. T. 208; 140 R. R. 793	195, 196
Prince v. Clark (1823), 2 D. & R. 266; 1 B. & C. 186; 25 R. R. 352; 1 L. J. (O.S.) K. B. 69	40
Pringle v. Gloag (1879), 10 Ch. D. 676; 48 L. J. Ch. 380	155
Prior v. Moore (1887), 3 T. L. R. 624	173
Prosperino Palasso, The (1872), 29 L. T. 622	219
Prosser v. Allen (1819), Gow, 117	234
Proudfoot v. Montefiori (1867), L. R. 2 Q. B. 511; 36 L. J. Q. B. 225; 16 L. T. 585; 15 W. R. 920	223
Provincial Ins. Co. of Canada v. Leduc (1874), L. R. 6 P. C. 224; 43 L. J. P. C. 49; 31 L. T. 142; 22 W. R. 929	261
Pryce, Re (1877), 4 Ch. D. 685; 36 L. T. 117	228
Public Prosecutions, Director of, v. Kent, etc., Ltd. , [1944] 1 K. B. 146; 113 L. J. K. B. 88	289
— <i>Works Comms. v. Pontypridd Masonic Hall</i> , [1920] 2 K. B. 233; 89 L. J. K. B. 607; 123 L. T. 334; 36 T. L. R. 459	235
Puddephatt v. Leith , [1916] 2 Ch. 168; 85 L. J. Ch. 543; 114 L. T. 1159	154
Pulteney v. Keymer (1800), 3 Esp. 182	148
Purves v. Landell (1845), 12 C. & F. 91; 69 R. R. 46	108
QUARMAN v. Burnett (1840), 6 M. & W. 499; 55 R. R. 717	2, 213
Quebec, etc., Ry. v. Quinn (1858), 12 Moo. P. C. 232; 124 R. R. 45	69
Queen of Portugal v. Glyn (1837), 7 C. & F. 466	266
Queen of Spain v. Parr (1869), 39 L. J. Ch. 73	96, 127
Queensland Investment Co. v. O'Connell (1896), 12 T. L. R. 502	193, 238, 251
Quinn, Ex p. (1883), 53 L. J. Ch. 302; 49 L. T. 811; 32 W. R. 296	162
R. v. Ascanio Puck & Co., Ltd. (1912), 76 J. P. 487	289
— <i>v. Barber</i> (1887), 3 T. L. R. 491	114
— <i>v. Bedwellty U. C.</i> , [1934] 1 K. B. 333; 103 L. J. K. B. 152; 150 L. T. 180; 98 J. P. 25; 31 L. G. R. 430; 50 T. L. R. 91	7

	PAGE
<i>R. v. Birmingham and Gloucester Ry. Co.</i> (1842), 3 Q. B. 223	288
— <i>v. Carr-Briant</i> , [1943] K. B. 607; 112 L. J. K. B. 581; 169 L. T. 175; 59 T. L. R. 300; [1943] 2 All E. R. 156	114
— <i>v. Chapman</i> , [1918] 2 K. B. 298; 87 L. J. K. B. 1142; 119 L. T. 59; 82 J. P. 229	33
— <i>v. Cory Bros., Ltd.</i> , [1927] 1 K. B. 810; 80 L. J. K. B. 761; 136 L. T. 735	288
— <i>v. Cumberland JJ.</i> (1848), 5 D. & L. 431; 17 L. J. Q. B. 102; 79 R. R. 859, n.; 12 Jur. 1025	31
— <i>v. De Kromme</i> (1892), 66 L. T. 301; 56 J. P. 682; 17 Cox, C. C. 492	114
— <i>v. Gainsford JJ.</i> (1913), 29 T. L. R. 359	289
— <i>v. Great North of England Ry. Co.</i> (1846), 9 Q. B. 315; 16 L. J. M. C. 16; 10 Jur. 755	288
— <i>v. I. C. R. Haulage, Ltd.</i> , [1944] W. N. 135; 60 T. L. R. 399; [1944] 1 All E. R. 691	288, 289
— <i>v. Jenkins</i> (1923), 87 J. P. 115; 67 S. J. 707; 39 T. L. R. 458; 17 C. A. R. 121	114
— <i>v. Leitrim JJ.</i> , [1900] 2 Ir. R. 397	274
— <i>v. London</i> (1858), E. B. & E. 122	217
— <i>v. Longnor</i> (1833), 4 B. & Ad. 647; 1 N. & M. 576	4, 31
— <i>v. Sankey</i> (1836), 5 L. J. K. B. 255; 5 A. & E. 423; 2 H. & W. 275; 6 N. & M. 839; 44 R. R. 453	151
— <i>v. Secretary of State for War</i> , [1891] 2 Q. B. 326; 60 L. J. Q. B. 457; 64 L. T. 764; 56 J. P. 105; 7 T. L. R. 579	261
— <i>v. Stamford</i> (1844), 6 Q. B. 433; 66 R. R. 449; 8 Jur. 909	31, 32
— <i>v. Stephens</i> (1865), L. R. 1 Q. B. 702; 14 L. T. 593; 14 W. R. 859; 7 B. & S. 710	288
— <i>v. Treasury</i> (1872), L. R. 7 Q. B. 387; 41 L. J. Q. B. 178; 20 L. T. 64; 20 W. R. 336	261
— <i>v. Wait</i> (1823), 11 Price, 518; 1 Bing. 121; 7 Moore, 473	283
— <i>v. Whitaker</i> , [1914] 3 K. B. 1283; 84 L. J. K. B. 245; 112 L. T. 41; 79 J. P. 28; 58 S. J. 707; 30 T. L. R. 627; 24 Cox C. C. 472; 10 C. A. R. 245	114
<i>R. M. K. R. M. v. M. R. M. V. L.</i> , [1926] A. C. 761; 95 L. J. P. C. 197; 135 L. T. 645; 42 T. L. R. 686	195
<i>Rabone v. Williams</i> (1785), 7 T. R. 360; 4 R. R. 463	202
<i>Radley v. L. C. C.</i> (1913), 109 L. T. 162; 29 T. L. R. 680	208
<i>Railton v. Hodgson</i> (1812), 15 East, 67; 13 R. R. 373	248
<i>Rainbow, The</i> (1885), 53 L. T. 91; 5 Asp. M. C. 479	162
<i>Rainbow v. Howkins</i> , [1904] 2 K. B. 322; 73 L. J. K. B. 641; 91 L. T. 149; 53 W. R. 46; 20 T. L. R. 508	169, 239, 251
<i>Rainford v. Keith</i> , [1905] 2 Ch. 147; 74 L. J. Ch. 531; 92 L. T. 786; 54 W. R. 189; 12 Manson, 278; 21 T. L. R. 582	222
<i>Rakusen v. Ellis</i> , [1912] 1 Ch. 831; 81 L. J. Ch. 409; 106 L. T. 556; 28 T. L. R. 326	100
<i>Raleigh v. Atkinson</i> (1840), 6 M. & W. 670; 55 R. R. 764	277
— <i>v. Goschen</i> , [1898] 1 Ch. 73; 67 L. J. Ch. 59; 77 L. T. 429; 46 W. R. 90	205, 267
<i>Ramazotti v. Bowring</i> (1859), 7 C. B. (n.s.) 851; 29 L. J. C. P. 30	202
<i>Rand (or Rank) v. Craig</i> , [1919] 1 Ch. 1; 88 L. J. Ch. 45; 119 L. T. 751; 35 T. L. R. 8	207
<i>Randell v. Trimen</i> (1856), 18 C. B. 786; 25 L. J. C. P. 307; 107 R. R. 516	249, 254
<i>Ranger v. G. W. Ry.</i> (1854), 5 H. L. C. 72; 101 R. R. 46	215
<i>Raphael's Claim</i> , [1916] 2 Ch. 309; 85 L. J. Ch. 625; 115 L. T. 134	130
<i>Raphael v. Bank of England</i> (1855), 17 C. B. 161; 25 L. J. C. P. 33; 104 R. R. 638	177
— <i>v. Goodman</i> (1838), 8 A. & E. 565	199
<i>Rapid Road Transit Co., Re</i> , [1909] 1 Ch. 96; 78 L. J. Ch. 132; 99 L. T. 774	157, 163
<i>Rashdall v. Ford</i> (1866), L. R. 2 Eq. 750; 35 L. J. Ch. 769; 14 L. T. 790; 14 W. R. 950	252
<i>Ratata, The</i> , [1898] A. C. 513; 67 L. J. P. 73; 78 L. T. 797; 47 W. R. 156; 8 Asp. M. C. 427	208

	PAGE
<i>Rawlyns v. Vandyke</i> (1800), 3 Esp. 250	24
<i>Raymond v. Wooten</i> (1931), 47 T. L. R. 606	127
<i>Rayner, Ex p.</i> (1868), 17 W. R. 64	189
— <i>v. Grote</i> (1846), 15 M. & W. 359; 16 L. J. Ex. 79; 71 R. R. 709	262
— <i>v. Mitchell</i> (1877), 2 C. P. D. 357; 25 W. R. 633	211
<i>Read v. Anderson</i> (1884), 13 Q. B. D. 779; 53 L. J. Q. B. 532; 51 L. T. 55; 49 J. P. 4; 32 W. R. 950	56, 143, 270, 278
— <i>v. Dupper</i> (1795), 6 T. R. 361; 3 R. R. 200	154
— <i>v. Legard</i> (1851), 6 Ex. 636; 20 L. J. Ex. 309; 86 R. R. 418; 15 Jur. 494; 17 L. T. 145	20
— <i>v. Rann</i> (1830), 10 B. & C. 438; 5 Man. & R. 144; 8 L. J. (o.s.) K. B. 144; 34 R. R. 473	120, 126
<i>Readdy v. Prendergast</i> (1887), 56 L. T. 790	89
<i>Real, etc., Advance Co. v. Phalempin</i> (1893), 9 T. L. R. 569	54
<i>Reckitt v. Barnett</i> , [1929] A. C. 176; 98 L. J. K. B. 136; 140 L. T. 208; 45 T. L. R. 36	49, 168
— <i>v. Nunburnholme</i> (1929), 45 T. L. R. 629	213
<i>Rederi A/B Argonaut v. Hani</i> , [1918] 2 K. B. 247; 87 L. J. K. B. 991; 118 L. T. 176	188
<i>Redfern v. Rosenthal</i> (1902), 86 L. T. 855	159
<i>Redgate v. Haynes</i> (1876), 1 Q. B. D. 89; 45 L. J. M. C. 65	286
<i>Redmell v. Eden</i> (1859), 1 F. & F. 542	40
<i>Redpath v. Wigg</i> (1866), L. R. 1 Ex. 335; 35 L. J. Ex. 211; 14 L. T. 764; 12 Jur. 903; 14 W. R. 866; 143 R. R. 700	12, 245
<i>Reece v. Rigby</i> (1821), 4 B. & A. 202; 23 R. R. 251	108
<i>Reed v. Moore</i> (1832), 5 C. & P. 200	23
— <i>v. Norris</i> (1837), 2 My. & C. 361, 374; 6 L. J. Ch. 197; 1 Jur. 233; 45 R. R. 88	93
— <i>v. White</i> (1804), 5 Esp. 122	196
<i>Reedie v. L. & N. W. Ry.</i> (1849), 4 Ex. 244; 20 L. J. Ex. 65; 80 R. R. 541	2
<i>Reese River Mining Co. v. Smith</i> (1869), L. R. 4 H. L. 64; 39 L. J. Ch. 849	199
<i>Reeve v. Conyngham</i> (1847), 2 C. & K. 444	24, 28
— <i>v. Davis</i> (1834), 1 A. & E. 312; 3 N. & M. 873; 40 R. R. 300	65
— <i>v. Palmer</i> (1859), 5 C. B. 84; 28 L. J. C. P. 168; 116 R. R. 573	78
— <i>v. Reeve</i> (1858), 1 F. & F. 280; 115 R. R. 911	119
<i>Refuge Ass. Co. v. Kettlewell</i> , [1909] A. C. 243; 78 L. J. K. B. 519; 100 L. T. 306; 25 T. L. R. 395	170, 173, 175, 199
<i>Regal (Hastings), Ltd. v. Gulliver</i> , [1942] 1 All E. R. 378	84
<i>Regier v. Campbell-Stuart</i> , [1939] Ch. 766; 108 L. J. Ch. 321; 161 L. T. 30; 55 T. L. R. 798; [1939] 3 All E. R. 235	87, 88
<i>Reichardt v. Shard</i> (1914), 31 T. L. R. 24	207
<i>Reid v. Draper</i> (1861), 6 H. & N. 813; 30 L. J. Ex. 268; 4 L. T. 650; 123 R. R. 850	236
— <i>v. Rigby</i> , [1894] 2 Q. B. 40; 63 L. J. Q. B. 451; 10 T. L. R. 418	183, 214
— <i>v. Teakle</i> (1853), 13 C. B. 627; 22 L. J. C. P. 161; 17 Jur. 841	21
<i>Reigate v. Union Manufg. Co.</i> , [1918] 1 K. B. 592; 87 L. J. K. B. 724; 118 L. T. 479	129
<i>Remington v. Broadwood</i> (1902), 18 T. L. R. 270	20
<i>Reneaux v. Teakle</i> (1853), 8 Ex. 680; 22 L. J. Ex. 241; 91 R. R. 703; 17 Jur. 351	20
<i>Renpor, The</i> (1883), 8 P. D. 115; 52 L. J. P. 49; 5 Asp. M. C. 98	66
<i>Rensburg, Ex p.</i> (1877), 4 Ch. D. 685; 66 L. T. 117	228
<i>Repetto v. Millar's, etc. Forests</i> , [1901] 2 K. B. 306; 70 L. J. K. B. 561; 84 L. T. 836; 49 W. R. 526; 6 Com. Cas. 129; 9 Asp. M. C. 215	263
<i>Reuter v. Electric Telegraph Co.</i> (1856), 6 E. & B. 341; 26 L. J. Q. B. 46; 106 R. R. 625	41

	PAGE
Reversion Fund, etc. Co. v. Maison Cosway, [1913] 1 K. B. 364; 82 L. J. K. B. 512; 108 L. T. 87; 20 Manson, 194	214
Reversionary Interest Soc. v. Locking, [1928] W. N. 227	6
Reyner v. Pearson (1812), 4 Taunt. 662; 13 R. R. 723	219
Reynolds v. Howell (1873), L. R. 8 Q. B. 398; 42 L. J. Q. B. 181	252
— v. Jex (1865), 7 B. & S. 86; 34 L. J. Q. B. 241; 13 W. R. 968; 147 R. R. 351	68
— v. Peapes (1890), 6 T. L. R. 49	236, 244
— v. Reynolds (1909), 26 T. L. R. 104	154
— v. Smith (1893), 9 T. L. R. 474, H. L.; 66 L. T. 808; 8 T. L. R. 391	139
Rhodes v. Bate (1865), L. R. 1 Ch. 252; 35 L. J. Ch. 267; 13 L. T. 778; 14 W. R. 292; 12 Jur. 178; 148 R. R. 255	90
— v. Fielder (1919), 89 L. J. K. B. 15; 122 L. T. 128	276
— v. Forwood (1876), 1 App. Cas. 256; 47 L. J. Ex. 396; 34 L. T. 890; 24 W. R. 1078	128, 274
— v. Macalister (1923), 29 Com. Cas. 19	133
— v. Moules, [1895] 1 Ch. 236; 64 L. J. Ch. 122; 71 L. T. 599; 43 W. R. 99	172
— v. Robinson (1837), 3 Bing. 677; 6 L. J. C. P. 235; 4 Scott, 396; 3 Hodges, 84; 1 Jur. 356; 43 R. R. 758	70, 71
— v. Sugden (1885), 29 Ch. D. 517; 54 L. J. Ch. 638; 52 L. T. 613; 33 W. R. 558	153
Rhosina, The (1885), 10 P. D. 131; 54 L. J. P. 72; 53 L. T. 30; 33 W. R. 794	214
Rice v. Chute (1801), 1 East, 579	234, 260
— v. Everett (1801), 1 East, 583, n	260
— v. Shepherd (1862), 12 C. B. 332; 6 L. T. 432; 133 R. R. 354	26
Ricards, <i>Ex p.</i> (1884), 14 Q. B. D. 22; 54 L. J. Q. B. 293; 51 L. T. 551; 33 W. R. 60	51
— v. Platel (1841), Cr. & Ph. 79; 10 L. J. Ch. 375; 5 Jur. 834; 54 R. R. 216	151
— v. West Middlesex Waterworks Co. (1885), 15 Q. B. D. 660; 54 L. J. Q. B. 551; 33 W. R. 902; 49 J. P. 631	208
Richardson v. Anderson (1805), 1 Camp. 43, n.; 10 R. R. 628, n.	56
— v. Cartwright (1844), 1 C. & K. 328	54
— v. Du Bois (1869), L. R. 5 Q. B. 51; 39 L. J. Q. B. 69; 21 L. T. 635; 18 W. R. 62; 10 B. & S. 830	20
— v. Goss (1802), 3 B. & P. 119; 6 R. R. 727	158
— v. Oxford (1861), 2 F. & F. 449; 121 R. R. 798	33
— v. Peto (1840), 1 M. & G. 896	221
— v. Stormont, [1900] 1 Q. B. 701; 69 L. J. Q. B. 369; 82 L. T. 316; 16 T. L. R. 224; 5 Com. Cas. 134	202
— v. Williamson (1871), L. R. 6 Q. B. 276; 40 L. J. Q. B. 145	250, 253
Ricketts v. Bennett (1847), 4 C. B. 686; 17 L. J. C. P. 17; 72 R. R. 691	55
— v. Tilling, [1915] 1 K. B. 644; 84 L. J. K. B. 342; 112 L. T. 137; 31 T. L. R. 17	210
Ridd v. Thorne, [1902] 2 Ch. 344; 71 L. J. Ch. 624; 86 L. T. 655; 50 W. R. 542	153
Ridgway v. Lees (1856), 25 L. J. Ch. 584	147, 186
Ridley v. Plymouth Grinding Co. (1848), 2 Ex. 711; 76 R. R. 742; 27 L. J. Ex. 252; 12 Jur. 542	9
Riga, The (1872), L. R. 3 Ad. 516; 41 L. J. Ad. 39	66
Right d. Fisher v. Cuthell (1804), 5 East, 491; 2 Smith, 83; 5 Esp. 149; 7 R. R. 752	38
Riley v. Packington (1867), L. R. 2 C. P. 536; 36 L. J. C. P. 204; 16 L. T. 382; 15 W. R. 746	16
Rimell v. Sampayo (1824), 1 C. & P. 254	17
Rimmer v. Knowles (1874), 30 L. T. 496; 22 W. R. 574	126
— v. Webster, [1902] 2 Ch. 163; 71 L. J. Ch. 561; 86 L. T. 491; 50 W. R. 517	177, 227
Ringdove, The (1886), 11 P. D. 120; 55 L. J. P. 56; 55 L. T. 552; 2 T. L. R. 811	156
Ripon City, The, [1897] P. 226; 66 L. J. P. 110; 77 L. T. 98; 13 T. L. R. 378	155

	PAGE
<i>Risbourg v. Bruckner</i> (1858), 3 C. B. 812; 27 L. J. C. P. 90; 111 R. R. 846; 6 W. R. 215	43, 102
<i>Ritchie v. Couper</i> (1860), 28 Beav. 344; 126 R. R. 159	94
<i>Robart v. Buée</i> (1878), 8 Ch. D. 198; 47 L. J. Ch. 414; 26 W. R. 393	155
<i>Robb v. Green</i> , [1895] 2 Q. B. 315; 64 L. J. Q. B. 593; 73 L. T. 15; 44 W. R. 25; 11 T. L. R. 517	90
<i>Robbins v. Fennell</i> (1847), 11 Q. B. 248; 17 L. J. Q. B. 77; 75 R. R. 363	71, 73
— <i>v. Heath</i> (1848), 11 Q. B. 257, n.; 75 R. R. 363, n.	73
<i>Roberts v. Barnard</i> (1884), 1 C. & E. 336	127
— <i>v. Ogilby</i> (1821), 9 Price, 269; 23 R. R. 671	8, 11, 80
— <i>v. Smith</i> (1859), 4 H. & N. 315; 28 L. J. Ex. 164; 118 R. R. 462	119
— <i>v. Woodward</i> (1890), 25 Q. B. D. 412; 49 L. J. M. C. 129; 63 L. T. 200; 38 W. R. 770	287
<i>Robertson v. Clarke</i> (1824), 1 Bing. 445; 8 Moo. 622; 25 R. R. 676; 2 L. J. (o.s.) C. P. 71	67
— <i>v. Fauntleroy</i> (1823), 8 Moo. 10; 1 L. J. (o.s.) C. P. 55	259, 276
— <i>v. Wait</i> (1853), 8 Ex. 299; 22 L. J. Ex. 209; 91 R. R. 497	261
<i>Robey v. Arnold</i> (1897), 14 T. L. R. 39	124
<i>Robins v. Bridge</i> (1837), 3 M. & W. 114; 6 Dowl. 140; M. & H. 357; 7 L. J. Ex. 49; 49 R. R. 531	230
<i>Robinson v. Beaconsfield R. D. C.</i> , [1911] 2 Ch. 188; 80 L. J. Ch. 647; 105 L. T. 121; 75 J. P. 353; 27 T. L. R. 478	6
— <i>v. Gleadow</i> (1835), 2 Bing. N. C. 156; 2 Scott, 250; 1 Hodges, 245; 42 R. R. 568	40, 53
— <i>v. Gosnold</i> (1703), 6 Mod. 171	28
— <i>v. Jenkins</i> (1890), 6 T. L. R. 69, 158	165
— <i>v. Lyall</i> (1819), 7 Price, 592	66
— <i>v. Mollett</i> (1874), L. R. 7 H. L. 802; 44 L. J. C. P. 362; 33 L. T. 544	58, 59, 85, 86, 138
— <i>v. Montgomery Brewery</i> , [1896] 2 Ch. 841	177
— <i>v. Mullett</i> (1817), 4 Price, 353; 18 R. R. 723	100
— <i>v. Read</i> (1829), 7 L. J. (o.s.) K. B. 236; 9 B. & C. 449; 4 M. & R. 349	196
— <i>v. Rutter</i> (1855), 4 E. & B. 954; 24 L. J. Q. B. 250; 99 R. R. 849	265
— <i>v. Vaughton</i> (1838), 8 C. & P. 252	206
— <i>v. Ward</i> (1825), 2 C. & P. 59; Ry. & M. 274	104
<i>Robson v. Kemp</i> (1802), 4 Esp. 233; 8 R. R. 831	163, 278
<i>Roche foucauld v. Boustead</i> , [1897] 1 Ch. 196; 66 L. J. Ch. 74; 75 L. T. 502; 45 W. R. 272; 13 T. L. R. 118	30
<i>Rocher v. Busher</i> (1815), 1 Stark. 27; 18 R. R. 742	66
<i>Rodick v. Gandell</i> (1852), 12 Beav. 328; 1 D. M. & G. 763; 91 R. R. 282	259
<i>Roe v. Birkenhead, etc. Ry.</i> (1851), 7 Ex. 36; 21 L. J. Ex. 9; 86 R. R. 564	211
— <i>d. Rochester v. Pierce</i> (1809), 2 Camp. 96; 11 R. R. 673	54
<i>Roebuck, The</i> (1874), 31 L. T. 274	133
<i>Rogers, Ex p., re Rogers</i> (1880), 15 Ch. D. 207; 43 L. T. 163; 29 W. R. 29	59, 136
— <i>v. Boehm</i> (1799), 2 Esp. 704	115
— <i>v. Hadley</i> (1861), 2 H. & C. 227; 32 L. J. Ex. 241	264
— <i>v. Lambert</i> , [1891] 1 Q. B. 318; 60 L. J. Q. B. 187; 64 L. T. 406; 39 W. R. 114; 7 T. L. R. 69	83
<i>Rolfe v. Abbott</i> (1833), 6 C. & P. 286	29
<i>Rolin v. Steward</i> (1854), 14 C. B. 595; 23 L. J. C. P. 148; 98 R. R. 774	111
<i>Rolland v. Hart</i> (1871), L. R. 6 Ch. 678; 40 L. J. Ch. 701; 25 L. T. 191	224
<i>Roper v. Commrs. of Works</i> , [1915] 1 K. B. 45; 84 L. J. K. B. 219; 111 L. T. 630	235, 267
<i>Rose, Re</i> (1894), 1 Manson, 218	276
<i>Rosenbaum v. Belson</i> , [1900] 2 Ch. 267; 69 L. J. Ch. 569; 82 L. T. 658; 48 W. R. 522	51, 57, 76, 173
<i>Rosewarne v. Billing</i> (1863), 15 C. B. 316; 33 L. J. C. P. 55; 9 L. T. 441	143

TABLE OF CASES.

lxxi

	PAGE
Ross v. Buxton (1889), 42 Ch. D. 190; 58 L. J. Ch. 442; 60 L. T. 630; 38 W. R. 71	152, 154
— v. Edwards (1895), 73 L. T. 100	83
— v. L. C. W. & Parr's Bank, [1919] 1 K. B. 678; 88 L. J. K. B. 927; 120 L. T. 636; 35 T. L. R. 315	272
Rossiter v. Trafalgar Life Assn. (1859), 27 Beav. 377; 122 R. R. 444	69
Rotherham Alum, etc., Co., <i>Re</i> (1883), 25 Ch. D. 103; 53 L. J. Ch. 290; 50 L. T. 219	35
Rothschild v. Brookman (1829—31), 7 L. J. Ch. 163; 3 Sim. 153; 5 Bli. 165; 2 Dow & Cl. 188; 30 R. R. 147	84, 85, 86, 98
Rothwell v. Timbrell (1842), 1 Dowl. 778	224
Rourke v. White Moss Colliery Co. (1877), 2 C. P. D. 205; 46 L. J. Q. B. 283	213
Routh v. MacMillan (1863), 2 H. & C. 750; 33 L. J. Ex. 38; 9 L. T. 541; 12 W. R. 381; 10 Jur. 158; 133 R. R. 778	49
Row v. Dawson (1749), 1 Ves. Sen. 331	260
Rowe v. London Piano Co. (1876), 34 L. T. 450	211
— v. May (1854), 18 Beav. 613; 104 R. R. 547	187
Rowland v. Air Council (1923), 39 T. L. R. 228, 455	225
— v. — (1927), 96 L. J. Ch. 470; 137 L. T. 794; 43 T. L. R. 717	235
— v. Chapman (1901), 17 T. L. R. 669	222, 232, 233
Rowlands v. Williams (1885), 2 T. L. R. 72	152
Rowles v. Senior (1846), 8 Q. B. 677; 70 R. R. 577	209
Rowton, <i>Ex p.</i> (1810), 17 Ves. 426	229
Roxburghe v. Cox (1881), 17 Ch. D. 520; 50 L. J. Ch. 772; 45 L. T. 225; 30 W. R. 74	259
Royal Albert Hall v. Winchelsea (1891), 7 T. L. R. 362	35
Royal British Bank v. Turquand (1856), 5 E. & B. 240; 6 E. & B. 327; 24 L. J. Q. B. 327; 25 L. J. Q. B. 317; 103 R. R. 461	55, 170
Royal Exchange Ass. v. Moore (1863), 8 L. T. 242; 11 W. R. 592	238, 256
Royle v. Busby (1880), 6 Q. B. D. 171; 50 L. J. Q. B. 196; 43 L. T. 717; 29 W. R. 315	239
Ruben v. Great Fingall Consolidated, [1906] A. C. 439; 75 L. J. K. B. 843; 95 L. T. 214; 22 T. L. R. 712; 13 Manson, 248	173
Rucker v. Lunt (1863), 3 F. & F. 959	118
Ruddiman v. Smith (1889), 60 L. T. 708; 37 W. R. 528; 53 J. P. 518; 5 T. L. R. 417	208
Ruddock v. Marsh (1857), 1 H. & N. 601; 28 L. T. 290; 5 W. R. 359; 108 R. R. 743	22
Ruddy v. Midland G. W. Ry. (1880), 8 L. R. Ir. 224	220
Rumball v. Metropolitan Bank (1877), 2 Q. B. D. 194; 46 L. J. Q. B. 346; 36 L. T. 240	178
Runquist v. Ditchell (1801), 3 Esp. 64	65
Rusby v. Scarlett (1803), 5 Esp. 76	174
Rushforth v. Hadfield (1906), 7 East, 224; 2 Smith, 634; 3 Smith, 221; 8 R. R. 520	147
Russel v. Reece (1847), 2 C. & K. 669	236
Russell v. Banglely (1821), 4 B. & A. 395; 34 R. R. 566, 567	202
— v. Hankey (1794), 6 T. R. 12; 3 R. R. 102	103, 105
— v. Palmer (1767), 2 Wils. 325	109
Russo-Chinese Bank v. Li Yau Sam, [1910] A. C. 174; 79 L. J. P. C. 60; 101 L. T. 689; 26 T. L. R. 203	183, 213
Rustomjee v. R. (1876), 2 Q. B. D. 69; 46 L. J. Q. B. 238; 36 L. T. 190; 25 W. R. 333	6
Rutherford v. Ounan, [1913] 2 Ir. R. 265	196
Ryan v. Fildes, [1938] 3 All E. R. 517	218
— v. Sams (1848), 12 Q. B. 460; 17 L. J. Q. B. 271; 76 R. R. 312; 12 Jur. 745	29, 284

	PAGE
SACCHARIN CORPN. v. Chemische Fabrik von Heyden Gesellschaft , [1911] 2 K. B. 516; 80 L. J. K. B. 1117; 104 L. T. 886	6
Sadd v. Foster (1897), 13 T. L. R. 207	143
Sadler, Re (1881), 19 Ch. D. 86; 45 L. T. 632; 30 W. R. 237	83, 164
— v. Leigh (1815), 4 Camp. 195; 2 Rose, 286	186, 264
Saffron Walden Bldg. Soc. v. Rayner (1880), 14 Ch. D. 406; 49 L. J. Ch. 465; 43 L. T. 3; 28 W. R. 681	226, 250
Sainsbury v. Jones (1840), 2 Beav. 462; 5 My. & C. 1; 4 Jur. 499; 48 R. R. 217.....	255
St. Margaret's Burial Board v. Thompson (1871), L. R. 6 C. P. 445; 40 L. J. C. P. 213; 24 L. T. 673; 19 W. R. 892	69
Salacia, The (1863), 32 L. J. Ad. 41; 7 L. T. 440; 11 W. R. 189	156, 239
Salaman v. Secretary of State for India , [1906] 1 K. B. 613; 75 L. J. K. B. 418; 94 L. T. 858	260, 267
Sale Hotel Co., Re (1898), 78 L. T. 368; 46 W. R. 617	95
Sales v. Crispi (1913), 29 T. L. R. 491	124
Salford Corporation v. Lever , [1891] 1 Q. B. 168; 60 L. J. Q. B. 39; 63 L. T. 658; 7 T. L. R. 18	113, 233
Salomans v. Pender (1865), 3 H. & C. 639; 34 L. J. Ex. 95; 12 L. T. 267; 13 W. R. 637; 11 Jur. 432; 140 R. R. 651	86, 133
Salomon v. Brownfield (1896), 12 T. L. R. 239	124
Salter's Claim (1891), 7 T. L. R. 602	119, 124
Salton v. New Beeston Cycle Co. , [1900] 1 Ch. 43; 69 L. J. Ch. 20; 81 L. T. 437; 48 W. R. 92; 7 Manson, 74; 16 T. L. R. 25	251, 252, 274, 280
Salvesen v. Rederi Aktiebolaget Nordstjernam , [1905] A. C. 302; 74 L. J. P. C. 96; 92 L. T. 575	109, 110
Samson v. Aitchison , [1912] A. C. 844; 82 L. J. P. C. 1; 107 L. T. 106; 28 T. L. R. 559	207
— v. Frazier, Jelke & Co. , [1937] 2 K. B. 170; 106 L. J. K. B. 854; 157 L. T. 530; 81 S. J. 398; [1937] 2 All E. R. 588	141
Samuel v. Rowe (1892), 8 T. L. R. 488	141
— v. Weatherby , [1908] 1 K. B. 184; 77 L. J. K. B. 69; 98 L. T. 169; 24 T. L. R. 160	249
Sandeman v. Scurr (1866), L. R. 2 Q. B. 86; 36 L. J. Q. B. 58; 15 L. T. 608; 15 W. R. 277	17
Sanderson v. Collins , [1904] 1 K. B. 628; 73 L. J. K. B. 358; 90 L. T. 243; 52 W. R. 354; 20 T. L. R. 249	211
Sandford v. Porter , [1912] 2 Ir. R. 551	64
Sandiford, Re , [1935] Ch. 681; 104 L. J. Ch. 335; 154 L. T. 7	119
Sargent v. Morris (1820), 3 B. & A. 277; 22 R. R. 382	262
Saunders v. Glass (1742), 2 Atk. 297	90
— v. Griffiths (1826), 5 B. & C. 909; 8 D. & R. 643; 4 L. J. (o.s.) K. B. 318; 53 R. R. 161	35
Savage, Re (1880), 15 Ch. D. 557	252
Savery v. King (1856), 5 H. L. C. 627; 25 L. J. Ch. 482; 101 R. R. 299 ...39, 87, 89, 101	
Sawers, Re (1879), 12 Ch. D. 522; 41 L. T. 46; 28 W. R. 334	175
Saxon v. Blake (1861), 29 Beav. 438; 131 R. R. 661	237
Sayers, Ex p. (1800), 5 Ves. 169; 5 R. R. 17	230
Scarf v. Jardine (1882), 7 App. Cas. 349	284
Schack v. Anthony (1813), 1 M. & S. 573	189
Schjott v. Schjott (1881), 45 L. T. 333	262
Schmaling v. Tomlinson (1815), 1 Marsh. 500; 6 Taunt. 147	71, 72
Schmaltz v. Avery (1851), 16 Q. B. 655; 20 L. J. Q. B. 228; 83 R. R. 653	262
Scholefield v. Lockwood (1868), L. R. 7 Eq. 83; 38 L. J. Ch. 232	152
Scholey v. Peck , [1893] 1 Ch. 709; 62 L. J. Ch. 658; 68 L. T. 118; 41 W. R. 508	153
Scho stall v. Johnson (1919), 36 T. L. R. 75	275
Schroeder v. Central Bank (1876), 34 L. T. 735; 24 W. R. 710	260
Schumack v. Lock (1825), 3 L. J. (o.s.) C. P. 57; 10 Moo. 39	220

TABLE OF CASES.

lxxiii

	PAGE
Schuster v. M'Kellar (1857), 7 E. & B. 704; 26 L. J. Q. B. 281; 110 R. R. 785	164, 206
Scott v. Brown, [1892] 2 Q. B. 724; 61 L. J. Q. B. 738; 67 L. T. 782; 41 W. R. 116	142
— v. Crawford (1842), 4 M. & G. 1031; 5 Scott, 781; 61 R. R. 750	71, 82
— v. Dunbar (1828), 1 Moll. 442	86
— v. Ebury (1867), L. R. 2 C. P. 255; 36 L. J. C. P. 161; 15 L. T. 506; 15 W. R. 517	35, 249
— v. Ernest (1900), 16 T. L. R. 498	194
— v. Franklin (1812), 15 East, 428	149
— v. Godfrey, [1901] 2 K. B. 726; 70 L. J. K. B. 954; 85 L. T. 415; 50 W. R. 61; 6 Com. Cas. 226; 17 T. L. R. 633	59, 194
— v. Irving (1830), 9 L. J. (o.s.) K. B. 89; 1 B. & Ad. 606; 35 R. R. 396	48
— v. Manchester Corpn. (1857), 2 H. & N. 204; 26 L. J. Ex. 406; 115 R. R. 493	214
— v. Porcher (1817), 3 Meriv. 652; 17 R. R. 161	260
— v. Surman (1742), Willes, 400	60, 229
Scottish Met. Ass. Co. v. Samuel, [1923] 1 K. B. 348; 92 L. J. K. B. 218; 128 L. T. 445	257
Scrace v. Whittington (1823), 2 B. & C. 11; 3 D. & R. 195; 31 R. R. 556	236
Scrimgeour's Claim (1870), L. R. 8 Ch. 921; 42 L. J. Ch. 657	141
Seaber v. Hawkes (1831), 5 M. & P. 549; 9 L. J. (o.s.) C. P. 217	237, 247
Seal v. Hudson (1847), 4 D. & L. 760	239
Seaton v. Benedict (1828), 5 Bing. 28; 2 M. & P. 66	20
Secretary of State for India v. Kamachee B. Sahaba (1859), 7 W. R. 722; 132 R. R. 7; 7 Moo. Ind. App. 476; 13 Moo. P. C. 22	33, 43
Segrave v. Kirwan (1828), Beat. 157	100
Segredo, The (1853), 1 Spinks, 36; 17 Jur. 738	67
Seligmann v. Huth (1877), 37 L. T. 488	150
Selsey v. Rhoades (1824), 2 S. & S. 41; 1 Bli. (n.s.) 1; 25 R. R. 150	88
Semenza v. Brinsley (1865), 18 C. B. 467; 34 L. J. C. P. 161; 12 L. T. 265; 13 W. R. 634; 11 Jur. 409; 144 R. R. 573	202
Sentance v. Hawley (1863), 13 C. B. 458; 7 L. T. 745; 11 W. R. 311; 134 R. R. 601	138
Serrell v. Derbyshire Ry. (1850), 9 C. B. 811; 19 L. J. C. P. 371; 82 R. R. 532	190
Service v. Bain (1893), 9 T. L. R. 95	141, 144
Seton v. Slade (1802), 7 Ves. 265, 276; 6 R. R. 124	62, 274
Seymour v. Bridge (1885), 14 Q. B. D. 460; 54 L. J. Q. B. 347; 1 T. L. R. 236	140
— v. Greenwood (1861), 30 L. J. Ex. 327; 7 H. & N. 355; 9 W. R. 785; 4 L. T. 833; 123 R. R. 868	216
— v. Kingscote (1922), 38 T. L. R. 586	21
— v. Pychlau (1817), 1 B. & A. 14	166
Shackell v. Rosier (1836), 2 Bing. N. C. 634; 3 Scott, 59; 2 Hodges, 17; 5 L. J. C. P. 193; 42 R. R. 666	142
Shallcross v. Oldham (1862), 2 Johns. & H. 609; 5 L. T. 824; 10 W. R. 291; 134 R. R. 359	94
Shand v. Grant (1863), 15 C. B. 324; 9 L. T. 390	257
Shanks, Re (1879), 11 Ch. D. 525; 48 L. J. Bk. 120; 40 L. T. 825; 27 W. R. 898	64, 99
Sharland v. Mildon (1846), 5 Hare, 469; 15 L. J. Ch. 434; 71 R. R. 180	256, 268
Sharman v. Brandt (1871), L. R. 6 Q. B. 720; 40 L. J. Q. B. 312; 19 W. R. 936	5, 263
Sharp, Ex p. (1844), 3 M. D. & De G. 490	281
— v. Taylor (1850), 2 Ph. 801; 78 R. R. 298	91
Sharpe v. Foy (1868), 17 W. R. 65	222
Shaw v. Arden (1832), 9 Bing. 287; 2 M. & Scott, 341; 2 L. J. C. P. 1; 1 Dowl. P. C. 705; 35 R. R. 526	135
— v. Holland, [1900] 2 Ch. 305; 69 L. J. Ch. 621; 82 L. T. 782; 48 W. R. 680; 7 Manson, 409	95, 111
— v. Picton (1825), 4 L. J. (o.s.) K. B. 29; 4 B. & C. 715; 7 Dow. & R. 201; 28 R. R. 455	81

	PAGE
<i>Shaw v. Port Philip Gold Mining Co.</i> (1884), 13 Q. B. D. 103; 53 L. J. Q. B. 369; 50 L. T. 685	173
— <i>v. Woodcock</i> (1827), 7 B. & C. 73; 9 D. & R. 889; 31 R. R. 158	3
<i>Shee v. Clarkson</i> (1810), 12 East, 507; 11 R. R. 473	5, 81
<i>Sheffield v. Eden</i> (1878), 10 Ch. D. 291; 40 L. T. 283	151
— <i>v. L. J. S. Bank</i> (1888), 13 App. Cas. 333; 57 L. J. Ch. 986; 58 L. T. 735; 37 W. R. 33; 4 T. L. R. 389	178
<i>Sheffield Corpn. v. Barclay</i> , [1905] A. C. 392; 74 L. J. K. B. 747; 93 L. T. 83; 54 W. R. 49; 69 J. P. 385; 10 Com. Cas. 287; 12 Manson, 248; 3 L. G. R. 992; 21 T. L. R. 642	251
<i>Sheldon v. Cox</i> (1764), 2 Eden, 224	225
<i>Shelton v. Livius</i> (1832), 1 L. J. Ex. 139; 2 C. & J. 411; 2 Tyr. 420; 37 R. R. 746 ...	62
— <i>v. Springett</i> (1851), 11 C. B. 452	29
<i>Shenstone v. Hilton</i> , [1894] 2 Q. B. 452; 63 L. J. Q. B. 584; 71 L. T. 339; 10 T. L. R. 557	270
<i>Shepard v. Brown</i> (1862), 7 L. T. 499; 11 W. R. 162	165
<i>Shepherd v. Bray</i> , [1907] 2 Ch. 571; 76 L. J. Ch. 692; 97 L. T. 729; 24 T. L. R. 17...	273
— <i>v. Gillespie</i> (1869), 38 L. J. Ch. 67	193
— <i>v. Mackoul</i> (1813), 3 Camp. 326; 14 R. R. 752	26
— <i>v. Robinson</i> , [1919] 1 K. B. 474; 88 L. J. K. B. 873; 120 L. T. 492; 35 T. L. R. 220	62
<i>Sheppard v. Union Bank</i> (1862), 7 H. & N. 661; 31 L. J. Ex. 154; 8 Jur. 265; 5 L. T. 759; 10 W. R. 299; 126 R. R. 630	179, 181
<i>Sheridan v. New Quay Co.</i> (1858), 4 C. B. 618; 28 L. J. C. P. 58; 114 R. R. 873	83
<i>Sherrard v. Barron</i> , [1923] 1 Ir. R. 21	94
<i>Shields v. Bank of Ireland</i> , [1901] 1 Ir. R. 222	178, 227
<i>Shiels v. Blackburne</i> (1789), 1 H. Bl. 159; 2 R. R. 750	79, 108
<i>Shipman v. Thompson</i> (1738), Willes, 104, n.	279
<i>Shippey v. Gray</i> (1880), 49 L. J. C. P. 524; 42 L. T. 673	153
<i>Shipway v. Broadwood</i> , [1899] 1 Q. B. 369; 68 L. J. Q. B. 360; 80 L. T. 11	233
<i>Shirreff's Claim</i> (1872), L. R. 14 Eq. 417; 42 L. J. Ch. 5	130
<i>Shoolbred, Ex p.</i> (1880), 28 W. R. 339	214
— <i>v. Baker</i> (1867), 16 L. T. 359	21
— <i>v. Roberts</i> , [1900] 2 Q. B. 497; 69 L. J. Q. B. 800; 83 L. T. 37; 7 Manson, 388...	284
<i>Short v. McCarthy</i> (1820), 3 B. & A. 626; 22 R. R. 503	103
— <i>v. Spaakman</i> (1831), 2 B. & Ad. 692	262
<i>Shrewsbury v. L. & N. W. Ry.</i> (1857), 6 H. L. C. 113; 108 R. R. 46; 26 L. J. Ch. 482; 3 Jur. 775	46
— <i>v. N. Staffs. Ry.</i> (1866), L. R. 1 Eq. 593; 35 L. J. Ch. 156; 13 L. T. 648; 14 W. R. 220	36
<i>Shubbrook, Ex p.</i> (1876), 2 Ch. D. 289; 45 L. J. Bk. 118; 34 L. T. 785	147
<i>Sickens v. Irving</i> (1859), 7 C. B. 165; 29 L. J. C. P. 25; 6 Jur. 200; 121 R. R. 436...	172
<i>Sigourney v. Lloyd</i> (1828), 8 B. & C. 622; 5 Bing. 525; 3 Man. & Ry. 58; 3 Y. & J. 220; D. & L. 132; 3 M. & P. 229; 32 R. R. 504	184
<i>Silesia, The</i> (1880), 5 P. D. 177; 43 L. T. 319; 29 W. R. 156	66
<i>Sill v. Thomas</i> (1839), 8 C. & P. 762	99
<i>Simmons v. Liberal Opinion, Ltd., Re Dunn</i> , [1911] 1 K. B. 966; 80 L. J. K. B. 617; 104 L. T. 264; 27 T. L. R. 278	252
<i>Simons v. Blake.</i> See <i>Symons v. Blake.</i>	
— <i>v. Patchett</i> (1857), 7 E. & B. 568; 26 L. J. Q. B. 195; 110 R. R. 730	253
<i>Simpson v. Eggington</i> (1855), 24 L. J. Ex. 312; 10 Ex. 845; 102 R. R. 867	37, 42
— <i>v. Lamb</i> (1856), 17 C. B. 603; 25 L. J. C. P. 113; 104 R. R. 806	127, 130
— <i>v. Swan</i> (1812), 3 Camp. 291; 13 R. R. 805	136, 141
<i>Simpson's Claim</i> (1887), 36 Ch. D. 532; 57 L. J. Ch. 169; 58 L. T. 16	173
<i>Sims v. Brittain</i> (1832). 1 N. & M. 594; 4 B. & Ad. 375	72
— <i>v. Landray</i> , [1894] 2 Ch. 318; 63 L. J. Ch. 535; 70 L. T. 530; 42 W. R. 621	13

<i>Sims v. Midland Ry.</i> , [1913] 1 K. B. 103; 82 L. J. K. B. 67; 107 L. T. 700; 29 T. L. R. 81; 18 Com. Cas. 44	14
<i>Sinclair v. Broughton</i> (1882), 47 L. T. 170	267
<i>Sinfra Aktiengesellschaft v. Sinfra, Ltd.</i> , [1939] 2 All E. R. 675	275
<i>Sivewright v. Archibald</i> (1851), 20 L. J. Q. B. 529; 17 Q. B. 103; 15 Jur. 947; 85 R. R. 353	191
<i>Skelton v. Wood</i> (1895), 71 L. T. 616	136, 144
<i>Sketchley, Re. See Boulton, Ex p.</i>	225
<i>Skinner v. Andrews</i> (1910), 26 T. L. R. 340	125
— <i>v. Stocks</i> (1821), 4 B. & A. 437; 23 R. R. 337	186
— <i>v. Weguelin</i> (1882), 1 C. & E. 12	117
<i>Skyring v. Greenwood</i> (1825), 4 B. & C. 281; 6 Dow. & Ry. 201; 1 C. & P. 517; 28 R. R. 264	141
<i>Skyrme, Ex p.</i> , [1912] 1 K. B. 393; 81 L. J. K. B. 721; 106 L. T. 47; 20 Manson, 11.	228
<i>Slath v. Wilson</i> (1839), 9 C. & P. 607	211
<i>Slingsby v. District Bank, Ltd. (Manchester)</i> , [1932] 1 K. B. 544; 101 L. J. K. B. 281; 146 L. T. 377; 37 Com. Cas. 39; 48 T. L. R. 114; 41 Ll. L. Rep. 138	145, 272
<i>Smallpiece v. Dawes</i> (1835), 7 C. & P. 40	186
<i>Smally v. Smally</i> (1700), 1 Eq. Ab. 6	5
<i>Smart v. Sandars</i> (1846—1848), 3 C. B. 380; 15 L. J. C. P. 39; 71 R. R. 384; 5 C. B. 895; 17 L. J. C. P. 258; 75 R. R. 849	60, 74, 275, 277
<i>Smethurst v. Mitchell</i> (1859), 1 E. & E. 623; 28 L. J. Q. B. 241; 7 W. R. 226; 117 R. R. 374	194, 197
<i>Smith, Ex p.</i> (1819), Buck, 355	230
—, <i>Ex p.</i> , <i>re</i> Homer Dist. Consol. Gold Mines (1888), 39 Ch. D. 546	9
—, <i>Re ex p.</i> Bright (1879), 10 Ch. D. 566; 48 L. J. Bk. 81; 39 L. T. 649; 27 W. R. 385	4, 230
—, <i>Re, Hands v. Andrews</i> (1893), 9 T. L. R. 238	116
— <i>v. Baker</i> (1873), L. R. 8 C. P. 350; 42 L. J. C. P. 155; 28 L. T. 637	44
— <i>v. Barton</i> (1866), 15 L. T. 294	78
— <i>v. Bedouin S. Nav. Co.</i> , [1896] A. C. 70; 65 L. J. P. C. 8; 12 T. L. R. 65	68, 219
— <i>v. Bennett</i> (1874), 30 L. T. 100	82
— <i>v. Betty</i> , [1903] 2 K. B. 317; 72 L. J. K. B. 853; 89 L. T. 258; 52 W. R. 137	152, 153
— <i>v. Bickmore</i> (1812), 4 Taunt. 474	284
— <i>v. Birmingham, etc. Gas Co.</i> (1834), 3 N. & M. 771; 1 A. & E. 526; 3 L. J. K. B. 165; 40 R. R. 358	31, 215
— <i>v. Blyth</i> , [1891] 1 Ch. 337; 60 L. J. Ch. 66; 63 L. T. 546; 39 W. R. 422	109
— <i>v. Cartwright</i> (1851), 6 Ex. 927; 20 L. J. Ex. 401	31
— <i>v. Clinton</i> (1909), 99 L. T. 840; 25 T. L. R. 34	142
— <i>v. Cologan</i> (1788), 2. T. R. 189	40, 43
— <i>v. Ferrand</i> (1827), 7 B. & C. 19; 9 D. & R. 803	198
— <i>v. Fox</i> (1848), 17 L. J. Ch. 170; 6 Hare, 386; 12 Jur. 130; 77 R. R. 152....	103
— <i>v. General Motor Cab Co., Ltd.</i> , [1911] A. C. 188; 80 L. J. K. B. 839; 105 L. T. 113; 27 T. L. R. 370	2
— <i>v. Goodwin</i> (1833), 4 B. & Ad. 413; 1 N. & M. 371; 2 N. & M. 114; 2 L. J. K. B. 192; 38 R. R. 272	207
— <i>v. Gould</i> (1842), 4 Moo. P. C. C. 21; 6 Jur. 543; 59 R. R. 326	66
— <i>v. Hammond</i> (1833), 6 Sim. 10	165
— <i>v. Hull Glass Co.</i> (1852), 11 C. B. 897; 21 L. J. C. P. 106; 87 R. R. 840; 16 Jur. 595; 7 Rail. Cas. 287	42, 53
— <i>v. Jackson</i> (1816), 1 Mad. 620; 16 R. R. 279	187
— <i>v. Keal</i> (1882), 9 Q. B. D. 340; 47 L. T. 142; 31 W. R. 76	64, 208
— <i>v. Lascelles</i> (1788), 2 T. R. 187; 1 R. R. 457	75, 97, 104
— <i>v. Lay</i> (1856), 3 Kay & J. 105; 112 R. R. 57	92
— <i>v. Leveaux</i> (1863), 1 H. & M. 123; 33 L. J. Ch. 167; 9 L. T. 313; 12 W. R. 31	165

	PAGE
<i>Smith v. Lindo</i> (1858), 5 C. B. (N.S.) 587; 27 L. J. C. P. 335; 116 R. R. 780	136
— <i>v. Lyon</i> (1813), 3 Camp. 465; 14 R. R. 810	266
— <i>v. MacGowan</i> , [1938] 3 All E. R. 447; 159 L. T. 278	13, 52
— <i>v. M'Guire</i> (1858), 3 H. & N. 554; 27 L. J. Ex. 465; 1 F. & F. 199; 117 R. R. 853	2, 168, 183
— <i>v. Martin</i> , [1911] 2 K. B. 775; 80 L. J. K. B. 1256; 105 L. T. 281; 27 T. L. R. 468	215
— <i>v. North Met. Tram. Co.</i> (1891), 55 J. P. 630; 7 T. L. R. 459	216
— <i>v. Paringa Mines</i> , [1906] 2 Ch. 193; 75 L. J. Ch. 702; 94 L. T. 571	55
— <i>v. Price</i> (1862), 2 F. & F. 748	110
— <i>v. Prosser</i> , [1907] 2 K. B. 735; 77 L. J. K. B. 71; 97 L. T. 155; 23 T. L. R. 597	50, 168
— <i>v. Reed</i> (1886), 2 T. L. R. 442	250
— <i>v. Reynolds</i> (1892), 66 L. T. 808; 8 T. L. R. 137, 391; 9 T. L. R. 474	139
— <i>v. Sleaf</i> (1844), 12 M. & W. 585	256
— <i>v. Sorby</i> (1875), 3 Q. B. D. 552, n.	233
— <i>v. Topping</i> (1833), 5 B. & Ad. 674; 2 N. & M. 421; 3 L. J. K. B. 47; 39 R. R. 616	228
— <i>v. Troup</i> (1849), 6 D. & L. 679; 7 C. B. 757; 18 L. J. C. P. 209; 78 R. R. 824	63, 169
— <i>v. Webster</i> (1876), 3 Ch. D. 49; 45 L. J. Ch. 528; 35 L. T. 44; 24 W. R. 894	56, 64
— <i>v. Winter</i> (1838), 4 M. & W. 454; 8 L. J. Ex. 34; 51 R. R. 678	47, 174
<i>Smith-Bird v. Blower</i> , [1939] 2 All E. R. 406	7
<i>Smout v. Ilbery</i> (1842), 12 L. J. Ex. 357; 10 M. & W. 1; 62 R. R. 510	251
<i>Smyth v. Anderson</i> (1849), 7 C. B. 21; 18 L. J. C. P. 109	188, 198
<i>Snark, The</i> , [1900] P. 105; 69 L. J. P. 41; 82 L. T. 42; 48 W. R. 279; 9 Asp. M. C. 50	6
<i>Snee v. Prescott</i> (1743), 1 Atk. 248	164, 261
<i>Snelgrove v. Ellringham Colliery</i> (1881), 45 J. P. 408	130
<i>Snell, Re</i> (1877), 5 Ch. D. 815; 36 L. T. 534; 25 W. R. 736	64, 162
— <i>v. Finch</i> (1863), 13 C. B. 661; 32 L. J. C. P. 117; 9 Jur. 333; 11 W. R. 341; 7 L. T. 747; 134 R. R. 684	13
<i>Snook v. Davidson</i> (1809), 2 Camp. 218; 11 R. R. 696	147, 161
<i>Snowball, Ex p.</i> (1872), L. R. 7 Ch. 534; 41 L. J. Bk. 49; 26 L. T. 894; 20 W. R. 786	280, 282
— <i>v. Goodriche</i> (1833), 2 L. J. K. B. 53; 4 B. & Ad. 541; 1 N. & M. 234	219
<i>Snowdon v. Davies</i> (1808), 1 Taunt. 359	256
<i>Soames v. Spencer</i> (1822), 1 D. & R. 32; 24 R. R. 631	33, 37, 41
<i>Soares v. Rahn</i> (1838), 3 Moo. P. C. C. 1	66
<i>Société Coloniale Anversoise v. London and Brazilian Bank</i> , [1911] 2 K. B. 1024; 80 L. J. K. B. 1361; 105 L. T. 658; 28 T. L. R. 44	229
<i>Société Générale de Paris v. Tramways Union Co.</i> (1884), 14 Q. B. D. 424; 54 L. J. Q. B. 177; 52 L. T. 912	225
<i>Sollers, Ex p.</i> (1811), 18 Ves. 229	229
<i>Solley v. Wood</i> (1852), 16 Beav. 370; 96 R. R. 179	71
<i>Solloway v. Johnson</i> , [1934] A. C. 193; 103 L. J. P. C. 49; 150 L. T. 451; 50 T. L. R. 268	194
<i>Solly v. Rathbone</i> (1814), 2 M. & S. 298	60, 70, 72, 160
— <i>v. Weiss</i> (1818), 2 Moo. 420	124
<i>Solomon v. Barker</i> (1862), 2 F. & F. 726; 11 W. R. 375; 121 R. R. 828	74, 75, 77, 98, 105
<i>Solomons v. Bank of England</i> (1810), 13 East, 135; 12 R. R. 341	159, 184
— <i>v. Dawes</i> (1794), 1 Esp. 83	38
<i>Solway, The</i> (1885), 10 P. D. 137; 54 L. J. P. 83; 53 L. T. 680; 34 W. R. 232	219
<i>Somerset v. Hart</i> (1884), 12 Q. B. D. 360; 53 L. J. M. C. 77; 48 J. P. 327	286
<i>South, Ex p.</i> (1818), 3 Swan. 392; 19 R. R. 227	259

South of Ireland Colliery Co. v. Waddle (1869), L. R. 4 C. P. 617; 38 L. J. C. P. 338; affirming L. R. 3 C. P. 463	31
South London Greyhound Racecourses v. Wake, [1931] 1 Ch. 496; 190 L. J. Ch. 169; 144 L. T. 607	173
Southampton v. Brown (1827), 5 L. J. (o.s.) K. B. 252; 6 B. & C. 718; 30 R. R. 511	189
Southport Banking Co., <i>Re</i> (1885), 1 T. L. R. 204	174
Southwell v. Bowditch (1876), 1 C. P. D. 374; 45 L. J. C. P. 630; 35 L. T. 196; 24 W. R. 838	244
Sowerby v. Butcher (1834), 3 L. J. Ex. 80; 2 C. & M. 368; 4 Tyr. 320	242
Sovfracht (V/O) v. Van Udens Scheepvaart en Agentuur Maatschappij (N. V. Gebr), [1943] A. C. 203; 112 L. J. K. B. 32; 59 T. L. R. 101; [1943] 1 All E. R. 76	275
Spackman v. Evans (1868), L. R. 3 H. L. 171	33, 39, 41
Spain (Queen of) v. Parr (1869), 39 L. J. Ch. 73	96, 127
Spalding v. Ruding (1843), 6 Beav. 376; 12 L. J. Ch. 503; 63 R. R. 120	150
Spartali v. Crédit Lyonnais (1886), 2 T. L. R. 178	228
Spears v. Hartley (1798), 3 Esp. 81; 6 R. R. 814	147, 162
Spedding v. Nevell (1869), L. R. 4 C. P. 212; 38 L. J. C. P. 133	255
Speight v. Gaunt (1883), 9 A. C. 81; 53 L. J. Ch. 419; 50 L. T. 330; 32 W. R. 435, H. L.	6
Spencer v. Topham (1856), 22 Beav. 573; 2 Jur. (n.s.) 865; 111 R. R. 488; 28 L. T. 56	89
Spittle v. Lavender (1821), 5 Moo. 270; 2 B. & B. 452; 23 R. R. 508	43, 243, 245
Spooner v. Browning, [1898] 1 Q. B. 528; 67 L. J. Q. B. 339; 78 L. T. 98; 46 W. R. 369; 14 T. L. R. 245	18
— v. Sandilands (1842), 1 Y. & Coll. C. C. 390; 57 R. R. 397	276
Springer v. G. W. Ry., [1921] 1 K. B. 257; 89 L. J. K. B. 1010; 124 L. T. 79; 15 Asp. M. C. 86	14
Spurr v. Cass (1870), L. R. 5 Q. B. 656; 39 L. J. Q. B. 249; 23 L. T. 409	186
Stackpole v. Erle (1761), 2 Wils. 133	131
Stafford v. Clark (1823), 3 L. J. (o.s.) C. P. 48; 1 C. & P. 24; 2 Bing. 377; 9 Moore, 724	229
Staffordshire, <i>The</i> (1872), L. R. 4 P. C. 194; 41 L. J. Ad. 49	66
Staffs Motor Guarantee v. British Motor Wagon Co., [1934] 2 K. B. 305; 103 L. J. K. B. 613; 151 L. T. 396	179
Stagg v. Elliott (1862), 12 C. B. (n.s.) 373; 31 L. J. C. P. 260; 6 L. T. 433	183
Stainbank v. Shepard (1853), 13 C. B. 418; 22 L. J. Ex. 341; 1 C. L. R. 609; 17 Jur. 1032; 93 R. R. 599	66
Stainton v. Carron Co. (1857), 24 Beav. 346; 27 L. J. Ch. 89; 116 R. R. 143	92
Standage v. Creighton (1832), 5 C. & P. 406	219
Stange v. Lowitz (1898), 14 T. L. R. 498	145
Stanlar v. Evans (1867), 3 T. L. R. 215	157
Stannard v. Ullithorne (1834), 10 Bing. 491; 4 M. & S. 359; 3 L. J. C. P. 307; 38 R. R. 518	109
Stansfeld v. Andrews (1909), 100 L. T. 529; 73 J. P. 167; 25 T. L. R. 259	287
Star Cinema v. Baker (1921), 126 L. T. 506; 86 J. P. 47; 20 L. G. R. 158	287
Star Corn Millers v. Moore (1886), 2 T. L. R. 751	35
Stark's Case, [1897] 1 Ch. 575; 66 L. J. Ch. 297; 76 L. T. 300	277
Starkey v. Bank of England, [1903] A. C. 114; 72 L. J. Ch. 402; 88 L. T. 244; 51 W. R. 513; 8 Com. Cas. 142; 19 T. L. R. 312	251
Staveley v. Uzielli (1860), 2 F. & F. 30; 121 R. R. 769	284
Steam Saw Mills v. Baring, [1922] A. C. 244; 91 L. J. Ch. 325; 126 L. T. 403; 38 T. L. R. 200; 66 S. J. 170	256
Stearine Co. v. Heintzmann (1864), 17 C. B. 56; 11 L. T. 272; 142 R. R. 245	111
Stedman v. Baker (1896), 12 T. L. R. 451	55
Steel v. Houlder (1887), 3 T. L. R. 300	237
— v. Lester (1877), 3 C. P. D. 121; 47 L. J. C. P. 43; 37 L. T. 642; 26 W. R. 212	65

	PAGE
<i>Steele v. Gourley</i> (1887), 3 T. L. R. 772	19, 249
— <i>v. Stuart</i> (1866), 14 L. T. 620	184
— <i>v. Williams</i> (1853), 8 Ex. 625; 22 L. J. Ex. 225; 91 R. R. 673	255
<i>Steele v. Smith</i> (1886), 2 T. L. R. 231	122
<i>Steigenberger v. Carr</i> (1841), 3 M. & G. 191	55
<i>Stein v. Cope</i> (1883), 1 C. & E. 63	62
<i>Stenning, Re</i> , [1895] 2 Ch. 433; 73 L. T. 207	229
<i>Stephens v. Badcock</i> (1832), 3 B. & Ad. 354; 1 L. J. K. B. 75; 37 R. R. 448	72
— <i>v. Elwall</i> (1815), 4 M. & S. 259; 16 R. R. 458	268
<i>Sterling, Ex p.</i> (1809), 16 Ves. 257; 10 R. R. 177	152
<i>Stevens v. Biller</i> (1883), 25 Ch. D. 31; 53 L. J. Ch. 249; 50 L. T. 36; 32 W. R. 419	2, 150
— <i>v. Hill</i> (1805), 5 Esp. 247	259
— <i>v. Hinshelwood</i> (1891), 55 J. P. 341	55, 211
— <i>v. Legh</i> (1853), 2 C. L. R. 251	200
— <i>v. Mid. Ry.</i> (1854), 2 C. L. R. 1300; 10 Ex. 352; 23 L. J. Ex. 328	267
— <i>v. Woodward</i> (1881), 6 Q. B. D. 318; 50 L. J. Q. B. 231; 44 L. T. 163; 29 W. R. 506	208
<i>Stevenson v. Aktiengesellschaft für Cartonnagen-Industrie</i> , [1918] A. C. 239; 87 L. J. K. B. 416; 118 L. T. 126; 34 T. L. R. 206	275
— <i>v. Blakelock</i> (1813), 1 M. & S. 535; 14 R. R. 525	151, 163
— <i>v. Mortimer</i> (1778), Cowp. 805	187, 266
<i>Stewart v. Aberdein</i> (1838), 7 L. J. Ex. 292; 4 M. & W. 211; 1 H. & H. 284; 51 R. R. 536	48
— <i>v. Fry</i> (1817), 1 Moo. 74; 7 Taunt. 339	260
— <i>v. Shannessy</i> (1900), 2 F. 1288	243
<i>Stiles v. Cardiff Nav. Co.</i> (1864), 33 L. J. Q. B. 310; 10 L. T. 844; 12 W. R. 1080 ..	224
<i>Stirling v. Maitland</i> (1864), 5 B. & S. 840; 34 L. J. Q. B. 1; 11 Jur. 218; 11 L. T. 337; 13 W. R. 76; 136 R. R. 776	128
<i>Stock Advance Co. v. Galmoye</i> (1887), 3 T. L. R. 808	138
<i>Stooken v. Patrick</i> (1873), 29 L. T. 507	26
<i>Stocker v. Brockelbank</i> (1851), 3 Mac. & G. 250; 20 L. J. Ch. 401; 87 R. R. 87; 15 Jur. 591; 18 L. T. 177	19
— <i>v. Wedderburn</i> (1857), 3 Kay & J. 393; 26 L. J. Ch. 713; 5 W. R. 671; 112 R. R. 204	19
<i>Stokes v. Trumper</i> (1855), 2 Kay & J. 232; 110 R. R. 201	135
<i>Stonard v. Dunkin</i> (1810), 2 Camp. 344; 11 R. R. 724	83
<i>Stone v. Cartwright</i> (1795), 6 T. R. 411; 3 R. R. 220	273
— <i>v. City and County Bank</i> (1877), 3 C. P. D. 282; 47 L. J. C. P. 681; 38 L. T. 9. 199	
<i>Stoneham v. Wyman</i> (1901), 6 Com. Cas. 174; 17 T. L. R. 562	194
<i>Stonehouse v. Gent</i> (1841), 2 Q. B. 431; 57 R. R. 718	66
<i>Storey v. Ashton</i> (1869), L. R. 4 Q. B. 476; 38 L. J. Q. B. 223; 10 B. & S. 337; 17 W. R. 727	211
<i>Strachan, Re</i> (1876), 4 Ch. D. 123; 46 L. J. Bk. 52; 35 L. T. 649; 25 W. R. 171	228
<i>Strangeways-Leamere v. Clayton</i> , [1936] 2 K. B. 11; 105 L. J. K. B. 385; 154 L. T. 463; 80 S. J. 306; 52 T. L. R. 374; 1 All E. R. 484	215
<i>Strathmore v. Vane</i> (1886), 33 Ch. D. 586; 56 L. J. Ch. 143; 55 L. T. 260; 35 W. R. 166	149
<i>Strauss v. Francis</i> (1866), L. R. 1 Q. B. 379; 35 L. J. Q. B. 133; 14 L. T. 326; 14 W. R. 634	62, 63, 167
<i>Stray v. Russell</i> (1860), 1 E. & E. 188; 28 L. J. Q. B. 279; 29 L. J. Q. B. 115; 117 R. R. 506	191
<i>Stubbing v. Heintz</i> (1791), 1 Peake, 66; 3 R. R. 651	174
<i>Stubbs v. Holywell Ry.</i> (1867), L. R. 2 Ex. 311; 36 L. J. Ex. 166	120
— <i>v. Slater</i> , [1910] 1 Ch. 632; 79 L. J. Ch. 420; 102 L. T. 444	118, 145
<i>Stumore v. Breen</i> (1886), 12 A. C. 698; 56 L. J. Q. B. 401	106
— <i>v. Campbell</i> , [1892] 1 Q. B. 314; 61 L. J. Q. B. 463; 66 L. T. 218; 40 W. R. 101	138

	PAGE
<i>Suart v. Haigh</i> (1893), 9 T. L. R. 488	249, 252
— <i>v. Welch</i> (1839), 4 Myl. & C. 305; 3 Jur. 237	8, 165
<i>Suffield and Watts, Re</i> (1888), 20 Q. B. D. 693; 58 L. T. 911; 36 W. R. 584	154
<i>Sullivan v. Pearson</i> (1868), L. R. 4 Q. B. 153; 38 L. J. Q. B. 65; 19 L. T. 430; 9 B. & S. 960	154
<i>Sultan, The</i> (1859), 5 Jur. 1060; Swa. 504	67
<i>Summers v. Solomon</i> (1857), 26 L. J. Q. B. 301; 7 E. & B. 879; 5 W. R. 660; 110 R. R. 872	17
<i>Sutton, Ex p.</i> (1788), 2 Cox, 84	70
— <i>v. Grey</i> , [1894] 1 Q. B. 285; 63 L. J. Q. B. 633; 69 L. T. 673; 42 W. R. 195; 10 T. L. R. 96	3
— <i>v. Spectacle Makers' Co.</i> (1864), 10 L. T. 411; 12 W. R. 742	32
— <i>v. Tatham</i> (1839), 10 A. & E. 27; 2 P. & D. 308; 8 L. J. Q. B. 210; 50 R. R. 312	56, 58, 138
<i>Swale v. Ipswich Tannery</i> (1906), 11 Com. Cas. 88	113
<i>Swan v. Mathieson</i> (1911), 103 L. T. 832; 27 T. L. R. 153	25
— <i>v. Miller</i> , [1919] 1 Ir. R. 151	219
<i>Sweet v. Pym</i> (1800), 1 East, 4; 5 R. R. 497	163
<i>Sweeting, Re</i> , [1898] 1 Ch. 268; 67 L. J. Ch. 159; 78 L. T. 6; 46 W. R. 242	131
— <i>v. Pearce</i> (1859), 7 C. B. 449; 29 L. J. C. P. 265; 6 Jur. 753; 121 R. R. 584	47, 48, 192
<i>Swift v. Jewesbury</i> (1874), L. R. 9 Q. B. 301; 30 L. T. 31; 43 L. J. Q. B. 56; 22 W. R. 319	7, 219, 267
<i>Swinbanks, Ex p.</i> (1879), 11 Ch. D. 525; 48 L. J. Bk. 120; 40 L. T. 825; 27 W. R. 898	64, 99
<i>Swinfen v. Swinfen</i> (1858), 2 De G. & J. 381; 27 L. J. Ch. 35, 491; 119 R. R. 160; 4 Jur. 774; 31 L. T. 157	63, 75
<i>Swire v. Francis</i> (1877), 3 App. Cas. 106; 47 L. J. P. C. 18; 37 L. T. 554	117, 212, 213
<i>Sykes v. Beadon</i> (1879), 11 Ch. D. 170	91
— <i>v. Giles</i> (1839), 5 M. & W. 645; 9 L. J. Ex. 106; 52 R. R. 870	47, 62, 98, 205
— <i>v. Sykes</i> (1870), L. R. 5 C. P. 113; 39 L. J. C. P. 179; 22 L. T. 236; 18 W. R. 551	268
<i>Symonds v. Kurtz</i> (1889), 61 L. T. 559; 53 J. P. 727	70
<i>Symons v. Blake</i> (1835), 2 C. M. & R. 416; 4 Dowl. 263; 1 Gale 182; 5 Tyr. 840; 4 L. J. Ex. 259; 1 M. & Rob. 477; 41 R. R. 750	155
TABBERNOR v. Tabbernor (1836), 2 Keen, 679	31
<i>Taff Vale Ry. v. Giles</i> (1853), 2 E. & B. 822; 23 L. J. Q. B. 43	215
<i>Tagart v. Marcus</i> (1888), 36 W. R. 469	264
<i>Tallentire v. Ayre</i> (1884), 1 T. L. R. 143	51
<i>Tamvaco v. Simpson</i> (1866), L. R. 1 C. P. 363; 35 L. J. C. P. 196; 14 L. T. 693; 14 W. R. 376	162
<i>Tanham v. Nicholson</i> (1872), L. R. 5 H. L. 561	224
<i>Tanner v. Christian</i> (1855), 4 E. & B. 591; 24 L. J. Q. B. 91; 99 R. R. 637	244
— <i>v. European Bank</i> (1865), L. R. 1 Ex. 261; 35 L. J. Ex. 151; 14 L. T. 414; 4 H. & C. 398; 12 Jur. 414; 14 W. R. 675; 144 R. R. 677	105
<i>Taplin v. Barrett</i> (1889), 6 T. L. R. 30	123
— <i>v. Florence</i> (1851), 20 L. J. C. P. 137; 10 C. B. 744; 84 R. R. 773	277
<i>Tapling v. Weston</i> (1883), 1 C. & E. 99	232
<i>Tappenbeck, Re</i> (1876), 2 Ch. D. 278; 45 L. J. Bk. 73; 34 L. T. 199; 24 W. R. 476	164
<i>Tardrew v. Howell</i> (1861), 3 Giff. 381; 31 L. J. Ch. 57; 5 L. T. 276; 10 W. R. 32 ...	155
<i>Tarkwa Main Reef v. Merton</i> (1903), 19 T. L. R. 367	93
<i>Tarn v. Scanlan</i> , [1928] A. C. 35; 97 L. J. K. B. 267; 138 L. T. 241; 13 Tax Cas. 91...	69
<i>Tasker v. Shepherd</i> (1861), 6 H. & N. 575; 30 L. J. Ex. 207; 4 L. T. 19; 9 W. R. 476	129, 280

	PAGE
<i>Tatam v. Reeve</i> , [1893] 1 Q. B. 44; 62 L. J. Q. B. 30; 67 L. T. 683; 41 W. R. 174; 9 T. L. R. 39	143
<i>Tate v. Hyslop</i> (1885), 15 Q. B. D. 368; 54 L. J. Q. B. 592; 53 L. T. 581	226
<i>Taxation Commrs. v. English, etc. Bank</i> , [1920] A. C. 683; 89 L. J. P. C. 181; 123 L. T. 34; 36 T. L. R. 305	272
<i>Taylor v. Great Indian Ry.</i> (1859), 28 L. J. Ch. 709; 4 De G. & J. 559; 5 Jur. 1087; 7 W. R. 637; 124 R. R. 389	227
<i>Taylor, Re</i> , [1891] 1 Ch. 590; 60 L. J. Ch. 525; 64 L. T. 605; 39 W. R. 417; 7 T. L. R. 262	151, 163, 196
— <i>v. Blacklow</i> (1836), 6 L. J. C. P. 14; 3 Scott, 614; 2 Hodges, 224; 3 Bing. N. C. 235; 43 R. R. 626	100, 106
— <i>v. Bowers</i> (1876), 1 Q. B. D. 291; 45 L. J. Q. B. 163; 34 L. T. 263; 24 W. R. 499	80, 284
— <i>v. Brewer</i> (1813), 1 M. & S. 290; 21 R. R. 831	119
— <i>v. Green</i> (1837), 8 C. & P. 316	211
— <i>v. Hailstone</i> (1882), 52 L. J. Q. B. 101	26
— <i>v. Kymer</i> (1832), 1 L. J. K. B. 114; 3 B. & Ad. 320; 37 R. R. 433	160
— <i>v. Lendey</i> (1807), 9 East, 49	283
— <i>v. Metro. Ry.</i> , [1906] 2 K. B. 55; 75 L. J. K. B. 735; 95 L. T. 148; 22 T. L. R. 479	256
— <i>v. Nixon</i> , [1910] 2 Ir. R. 94	286
— <i>v. Plumer</i> (1815), 3 M. & S. 562; 16 R. R. 361	230
— <i>v. Robinson</i> (1818), 2 Moo. 730	148
— <i>v. Salmon</i> (1838), 4 Myl. & C. 139; 48 R. R. 34	86
— <i>v. Sheppard</i> (1835), 1 Y. & Coll. 271	197
— <i>v. Stray</i> (1857), 2 C. B. 175, 197; 26 L. J. C. P. 287; 109 R. R. 653	139
— <i>v. Yorkshire Ins. Co.</i> , [1913] 2 Ir. R. 1	222
<i>Teed v. Elworthy</i> (1811), 4 East, 210	263
<i>Tempany v. Hakewill</i> (1858), 1 F. & F. 438; 115 R. R. 936	26
<i>Temperley v. Blackrod Manufacturing Co., Ltd.</i> (1907), 71 J. P. 341	113
<i>Tempest v. Ord</i> (1815), 1 Madd. 89	196
<i>Tenant v. Elliott</i> (1797), 1 B. & P. 3; 4 R. R. 755	81
<i>Tennant v. Strachan</i> (1829), 4 C. & P. 31; Moo. & Mal. 377	229
<i>Tennent v. Glasgow Bank</i> (1879), 4 App. Cas. 615; 40 L. T. 694; 27 W. R. 649	199
<i>Tetley v. Shand</i> (1872), 25 L. T. 658; 20 W. R. 206	98, 166
<i>Thacker v. Hardy</i> (1878), 4 Q. B. D. 685; 48 L. J. Q. B. 289; 39 L. T. 595; 27 W. R. 158	135, 143
— <i>v. Moates</i> (1831), 1 M. & Rob. 79	66
<i>Thames & Mersey Marine Ins. Co. v. Societa, etc. del Lloyd Austriaco</i> , [1914] 111 L. T. 97; 30 T. L. R. 475; 12 Asp. M. C. 491	6
<i>Tharsis Copper Co. v. La Société des Métaux</i> (1889), 58 L. J. Q. B. 435; 60 L. T. 924	6
<i>Tharsis Sulphur Co. v. Loftus</i> (1872), L. R. 8 C. P. 1; 42 L. J. C. P. 6	77
<i>Thayer v. Lister</i> (1861), 30 L. J. Ch. 429; 9 W. R. 360	184
<i>Thetis, The</i> (1869), L. R. 2 Ad. 365; 38 L. J. Ad. 42	65
<i>Thickbroom, Re</i> (1862), 6 L. T. 558	230
<i>Thomas v. Atherton</i> (1878), 10 Ch. D. 185; 48 L. J. Ch. 370	145
— <i>v. Bishop</i> (1743), 2 Str. 955	241
— <i>v. Finlayson</i> (1871), 19 W. R. 255	252
— <i>v. Lewis</i> (1878), 4 Ex. D. 18; 48 L. J. Ex. 7; 39 L. T. 669; 27 W. R. 111	53
— <i>v. R.</i> (1874), L. R. 10 Q. B. 31; 44 L. J. Q. B. 9; 31 L. T. 439; 23 W. R. 176	185
<i>Thompson v. Adams</i> (1889), 23 Q. B. D. 361	144, 283
— <i>v. Bell</i> (1854), 10 Ex. 10; 2 C. L. R. 1213; 23 L. J. Ex. 321; 102 R. R. 445	213
— <i>v. Cartwright</i> (1863), 33 Beav. 178; 9 L. T. 138; 11 W. R. 109; 2 N. R. 569; 140 R. R. 78	224

	PAGE
Thompson v. Gardiner (1876), 1 C. P. D. 777	5, 61, 191
— v. Giles (1824), 2 L. J. (o.s.) K. B. 48; 3 D. & R. 733; 2 B. & C. 422; 26 R. R. 392	229
— v. Havelock (1808), 1 Camp. 527; 10 R. R. 744	98
— v. Hervey (1768), 4 Burr. 2177	25
— v. Meade (1891), 7 T. L. R. 698	93, 145
— v. Thomas (1896), 11 T. L. R. 304	122
Thomson, Re, [1930] 1 Ch. 203; 99 L. J. Ch. 156; 142 L. T. 253	84
— v. Clydesdale Bank, [1893] A. C. 282; 62 L. J. P. C. 91; 69 L. T. 156	178
— v. Davenport (1829), 7 L. J. (o.s.) K. B. 134; 9 B. & C. 78; 4 Man. & R. 110; 32 R. R. 578	195
Thorman v. Burt (1886), 54 L. T. 349	68
Thorne v. Tilbury (1858), 3 H. & N. 534; 27 L. J. Ex. 407; 117 R. R. 844	83
Thornton v. Fehr (1935), 51 Ll. L. R. 330	191, 236
— v. Meux (1827), M. & M. 43; 31 R. R. 711	194
Thornton-Smith v. Motor Union Ins. Co. (1913), 30 T. L. R. 139	223
Thuman v. Best (1907), 97 L. T. 239	57, 173
Thwaites v. Mackerson (1828), 3 C. & P. 341; Moo. & Mal. 199	135
Tickel v. Short (1750), 2 Ves. 238	110
Tiedemann, Re, [1899] 2 Q. B. 66; 68 L. J. Q. B. 852; 81 L. T. 191	37, 39
Tiessen v. Henderson, [1899] 1 Ch. 861; 68 L. J. Ch. 353; 80 L. T. 483; 47 W. R. 459; 6 Manson, 340	84, 86
Tigress, The (1863), B. & L. 38; 8 L. T. 117; 11 W. R. 538	164
Tilney v. Stansfield (1880), 28 W. R. 582	116
Tindall v. Barnett (1887), 3 T. L. R. 476	156
Tingley v. Müller, [1917] 2 Ch. 144; 86 L. J. Ch. 625; 116 L. T. 482; 33 T. L. R. 369	275
Tobin v. Crawford (1842), 12 L. J. Ex. 490; 9 M. & W. 716; 52 R. R. 701	172
— v. R. (1864), 16 C. B. 310; 33 L. J. C. P. 199; 10 L. T. 702; 12 W. R. 838; 10 Jur. 1029; 139 R. R. 504	205
Todd v. Emly (1841), 10 L. J. Ex. 161; H. & W. 144; 7 M. & W. 427; 56 R. R. 748	18
— v. Reid (1821), 4 B. & Ald. 210; 3 Stark. 16	48
— v. Robinson (1825), 1 R. & M. 217	17
Tomson v. Judge (1855), 3 Drew. 306; 24 L. J. Ch. 785; 1 Jur. 583; 3 W. R. 561; 25 L. T. 233; 106 R. R. 362	90
Tonge v. Ward (1869), 21 L. T. 480	207
Tooke v. Hollingworth (1793), 5 T. R. 215; 2 H. Bl. 501; 2 R. R. 573	230
Topham v. Braddick (1809), 1 Taunt. 572; 10 R. R. 610	97
Toplis v. Grane (1839), 9 L. J. C. P. 180; 5 Bing. N. C. 636; 7 Scott, 620; 2 Arn. 110; 50 R. R. 814	135, 142
Toppin v. Healey (1863), 11 W. R. 466; 1 N. R. 326; 132 R. R. 835	132
Torrington v. Lowe (1868), L. R. 4 C. P. 26; 38 L. J. C. P. 121	189
Tottenham v. Green (1863), 32 L. J. Ch. 201; 1 N. R. 466; 139 R. R. 326	177
Touche v. Metropolitan Warehousing Co. (1871), L. R. 6 Ch. 671	35
Toulmin v. Millar (1887), 58 L. T. 96; 3 T. L. R. 836	121
Towers v. African Tug Co., [1904] 1 Ch. 558; 73 L. J. Ch. 395; 90 L. T. 298; 52 W. R. 532; 11 Manson, 198; 20 T. L. R. 292	105
Towle v. White (1873), 29 L. T. 78; 21 W. R. 405	3
Townend v. Drakeford (1843), 1 C. & K. 20; 70 R. R. 764	191
Townsend v. Inglis (1816), Holt, 278; 17 R. R. 636	170, 202
Townson v. Wilson (1808), 1 Camp. 396	255
Transvaal Lands Co. v. New Belgium Co., [1914] 2 Ch. 488; 84 L. J. Ch. 94; 112 L. T. 967; 31 T. L. R. 1	84
Tredwen v. Bourne (1840), 9 L. J. Ex. 220; 6 M. & W. 461; 4 Jur. 747; 55 R. R. 689	55

	PAGE
Trent v. Hunt (1853), 9 Ex. 14; 22 L. J. Ex. 318; 96 R. R. 517	13
Treuttel v. Barandon (1817), 8 Taunt. 100; 1 Moo. 543; 19 R. R. 472	185
Tribe v. Taylor (1876), 1 C. P. D. 505	122
Trickett v. Tomlinson (1863), 13 C. B. 663; 7 L. T. 678; 134 R. R. 688	168
Trimble v. Hill (1879), 5 App. Cas. 342; 49 L. J. P. C. 49; 42 L. T. 103; 28 W. R. 479	284
Triplex Safety Glass Co., Ltd. v. Lancegaye Safety Glass (1934), Ltd., [1939] 2 K. B. 395; 108 L. J. K. B. 763; 160 L. T. 595; 55 T. L. R. 726; [1939] 2 All E. R. 613	288
Trollope v. Caplan, [1936] 2 K. B. 382; 105 L. J. K. B. 819; 155 L. T. 365; 41 Com. Cas. 325; 52 T. L. R. 630; [1936] 2 A. E. R. 642	127
— v. Martyn, [1934] 2 K. B. 436; 103 L. J. K. B. 634; 40 Com. Cas. 53; 78 S. J. 568; 50 T. L. R. 544; 152 L. T. 88	127
Tronson v. Dent (1853), 8 Moo. P. C. 419; 97 R. R. 62	209
Trott v. National Discount Co. (1900), 17 T. L. R. 37	213
Trueman v. Loder (1840), 11 A. & E. 589; 3 P. & D. 267; 52 R. R. 451; 9 L. J. Q. B. 165	17, 186, 284
Truman's Case, [1894] 3 Ch. 272; 63 L. J. Ch. 635; 71 L. T. 328; 43 W. R. 73	224
Trustee, <i>Ex p.</i> , re Ely (1900), 48 W. R. 693; 82 L. T. 501	268
Trye, <i>Re</i> (1838), 3 Dea. 169; 2 Jur. 208	230
Tunley v. Evans (1845), 2 D. & L. 747; 14 L. J. Q. B. 116; 69 R. R. 877	219
Tupper . Foulkes (1861), 9 C. B. 797; 30 L. J. C. P. 214; 3 L. T. 741; 7 Jur. 709; 9 W. R. 349; 127 R. R. 889	41
Turnbull v. Garden (1869), 20 L. T. 318	94
Turner, <i>Ex p.</i> (1861), 30 L. J. Ch. 29	152
—, <i>Re</i> , [1907] 2 Ch. 126, 539; 76 L. J. Ch. 492; 96 L. T. 798; 23 T. L. R. 524	152
— v. Burkinshaw (1867), L. R. 2 Ch. 488; 15 W. R. 753	76, 115
— v. Deane (1849), 3 Ex. 836; 18 L. J. Ex. 343; 6 D. & L. 669; 77 R. R. 855	157
— v. Goldsmith, [1891] 1 Q. B. 544; 60 L. J. Q. B. 247; 64 L. T. 301; 7 T. L. R. 233	128
— v. Hockey (1887), 56 L. J. Q. B. 301	270
— v. Letts (1855), 20 Beav. 185; 24 L. J. Ch. 638; 109 R. R. 97	157
— v. Reeve (1901), 17 T. L. R. 592	118, 119
— v. Rooks (1839), 2 P. & D. 294; 10 A. & E. 47; 8 L. J. Q. B. 211; 50 R. R. 320	26
— v. Sampson (1911), 27 T. L. R. 200	3
— v. Thomas (1871), L. R. 6 C. P. 610; 40 L. J. C. P. 271; 24 L. T. 879	203
Turpin v. Bilton (1843), 5 M. & G. 455; 6 Scott, N. R. 447; 12 L. J. C. P. 167...74, 78, 106	
Turrel v. Collet (1795), 1 Esp. 320	236
Tweed, <i>Ex p.</i> , [1899] 2 Q. B. 167; 68 L. J. Q. B. 794; 81 L. T. 1; 48 W. R. 5	153
Twycross v. Dreyfus (1877), 5 Ch. D. 605; 46 L. J. Ch. 510; 36 L. T. 752	260
Twyman v. Porter (1870), L. R. 11 Eq. 181; 40 L. J. Ch. 30; 23 L. T. 551; 19 W. R. 151	153
Tyars v. Alsop (1888), 59 L. T. 367; 37 W. R. 339; 5 T. L. R. 242	90
Tyler v. Dairy Supply Co. (1908), 98 L. T. 867	7
Tyrrell v. Bank of London (1862), 10 H. L. C. 26; 31 L. J. Ch. 369; 6 L. T. 1; 10 W. R. 359; 8 Jur. 849; 138 R. R. 14	85, 116
UDELL v. Atherton (1861), 7 H. & N. 172; 30 L. J. Ex. 337; 4 L. T. 797; 7 Jur. 777; 126 R. R. 383	212
Underwood, <i>Ex p.</i> (1845), 9 Jur. 632	162
— v. Bank of Liverpool, [1924] 1 K. B. 775; 93 L. J. K. B. 690; 131 L. T. 271; 40 T. L. R. 302	272
— v. Lewis, [1894] 2 Q. B. 306; 64 L. J. Q. B. 60; 70 L. T. 833; 10 T. L. R. 465	100, 126, 133
— v. Nicholls (1855), 17 C. B. 239; 25 L. J. C. P. 79; 104 R. R. 675	47

	PAGE
Union Bank of Australia <i>v.</i> McClintock, [1922] 1 A. C. 240; 91 L. J. P. C. 108; 126 L. T. 588	41
— <i>v.</i> Murray-Aynsley, [1898] A. C. 693	178, 227, 273
Union Cement Co., <i>Re</i> (1872), 26 L. T. 240; 20 W. R. 361	156
Union Corp. <i>v.</i> Charrington (1902), 19 T. L. R. 129; 8 Com. Cas. 99	144
Union Credit Bank <i>v.</i> Mersey Docks, etc. Board, [1899] 2 Q. B. 205; 68 L. J. Q. B. 842; 81 L. T. 44	15, 270, 271
United Kingdom M.S.S. Assn. <i>v.</i> Nevill (1887), 19 Q. B. D. 110; 56 L. J. Q. B. 522; 35 W. R. 746; 3 T. L. R. 658	187
United Service Co., <i>Re</i> (1870), L. R. 6 Ch. 212; 40 L. J. Ch. 286; 24 L. T. 115; 19 W. R. 457	107, 110
Universal Steam Nav. Co. <i>v.</i> McKelvie, [1923] A. C. 492; 92 L. J. K. B. 647; 39 T. L. R. 480; 129 L. T. 395	246
Universal Stock Exchange <i>v.</i> Strachan, [1896] A. C. 166; 65 L. J. Q. B. 429; 74 L. T. 468; 44 W. R. 497	143
Univero Ins. Co. <i>v.</i> Merchants Ins. Co., [1897] 2 Q. B. 93; 66 L. J. Q. B. 564; 45 W. R. 625; 13 T. L. R. 432	194
Unwin <i>v.</i> Wolseley (1787), 1 T. R. 674	234
Uppington <i>v.</i> Bullen (1842), 2 Dr. & War. 184	89
Uxbridge Permanent Benefit Building Society <i>v.</i> Pickard, [1939] 2 K. B. 248; 108 L. J. K. B. 757; 160 L. T. 407; 55 T. L. R. 579; [1939] 2 All E. R. 344	212
VACHER <i>v.</i> London Soc. of Compositors, [1913] A. C. 107; 82 L. J. K. B. 232; 107 L. T. 722; 29 T. L. R. 73	217
Vale of Neath Colliery Co. <i>v.</i> Furness (1876), 45 L. J. Ch. 276	57
Valpy <i>v.</i> Sanders (1848), 5 C. B. 887; 17 L. J. C. P. 249; 75 R. R. 844	41
Vandepitte <i>v.</i> Preferred Accident Ins. Corpn. of New York, [1933] A. C. 70; 102 L. J. P. C. 21; 148 L. T. 169; 49 T. L. R. 90; W. C. & L. Rep. 171; 76 S. J. 798; 44 Ll. L. Rep. 41	189
Vanderzee <i>v.</i> Willis (1789), 3 Bro. C. C. 21	149
Van Omeron <i>v.</i> Dowick (1809), 2 Camp. 42; 11 R. R. 656	67, 209
Van Praagh <i>v.</i> Everidge, [1903] 1 Ch. 434; 72 L. J. Ch. 260; 88 L. T. 249; 51 W. R. 357	13, 62
Van Sandau <i>v.</i> Browne (1832), 9 Bing. 402; 2 M. & Scott, 543; 1 Dowl. 715; 2 L. J. C. P. 34; 35 R. R. 571	100, 133
Van Toll <i>v.</i> Chapman (1857), 8 E. & B. 396; 27 L. J. Q. B. 1; 112 R. R. 619	108
Van Wort <i>v.</i> Woolley (1830), M. & M. 520	107
Varden <i>v.</i> Parker (1799), 2 Esp. 710	102
Vaughan <i>v.</i> Moffat (1868), 38 L. J. Ch. 144	181
Venning <i>v.</i> Bray (1862), 2 B. & S. 502; 31 L. J. Q. B. 181; 6 L. T. 327; 8 Jur. 1039; 10 W. R. 56; 127 R. R. 458	283
Vernall, <i>Ex p.</i> (1892), 10 Morrell, 8	20
Vernon <i>v.</i> Hankey (1787), 2 T. R. 113; 1 R. R. 444	281
Vickers <i>v.</i> Church Extension Assn. (1888), 4 T. L. R. 674	127
Victor, The (1865), 13 L. T. 21	67
Vimboa, <i>Re</i> , [1900] 1 Ch. 470; 69 L. J. Ch. 209; 82 L. T. 597; 48 W. R. 520	12
Viney <i>v.</i> Chaplin (1858), 2 De G. & J. 468; 27 L. J. Ch. 434; 119 R. R. 213; 4 Jur. 619; 6 W. R. 562	64
Vulcan Car Agency <i>v.</i> Fiat Motors (1915), 32 T. L. R. 73	125
WADDELL <i>v.</i> Blockey (1879), 4 Q. B. D. 678; 48 L. J. Q. B. 517; 41 L. T. 458; 27 W. R. 931	111
Waddington <i>v.</i> Neale (1907), 96 L. T. 786; 23 T. L. R. 464	179, 270
Wadsworth, <i>Re</i> (1886), 29 Ch. D. 517; 54 L. J. Ch. 638; 52 L. T. 613; 33 W. R. 558... 153	
— <i>v.</i> Marshall (1832), 2 C. & J. 665; 1 L. J. Ex. 250; 37 R. R. 810	100, 126

	PAGE
<i>Wagstaff v. Wilson</i> (1832), 4 B. & Ad. 339; 1 N. & M. 4	219
<i>Wainwright's Case</i> (1890), 6 T. L. R. 413	199
<i>Waithman v. Wakefield</i> (1807), 1 Camp. 120; 10 R. R. 654	20, 42
<i>Wake v. Dyer</i> (1911), 104 L. T. 448; 75 J. P. 210; 22 Cox, C. C. 413	286
— <i>v. Harrop</i> (1862), 1 H. & C. 202; 31 L. J. Ex. 451; 7 L. T. 96; 10 W. R. 626, Ex. Ch.; affirming 6 H. & N. 768; 30 L. J. Ex. 273; 130 R. R. 461	246
<i>Wakefield v. Duckworth</i> , [1915] 1 K. B. 218; 84 L. J. K. B. 335; 112 L. T. 130; 31 T. L. R. 40	239
— <i>v. Newbon</i> (1844), 6 Q. B. 276; 13 L. J. Q. B. 258; 66 R. R. 379	158, 256
<i>Walden, Re</i> (1839), Mont. & Ch. 625; 4 Dea. 202	4
<i>Waldo v. Martin</i> (1825), 4 B. & C. 319; 6 D. & R. 364; 2 C. & P. 1; 28 R. R. 289 ...	131
<i>Waldy v. Gray</i> (1875), L. R. 20 Eq. 238; 44 L. J. Ch. 394	224
<i>Walker, Re</i> (1893), 68 L. T. 517; 3 R. 455	151
— <i>v. Barker</i> (1900), 16 T. L. R. 393	47
— <i>v. Birch</i> (1795), 6 T. R. 258	149
— <i>v. Fraser</i> , [1910] S. C. 222	122
— <i>v. G. W. Ry.</i> (1867), L. R. 2 Ex. 228	54
— <i>v. Hunter</i> (1845), 2 C. B. 324; 15 L. J. C. P. 12	35
— <i>v. Manchester, etc. Banking Co.</i> (1913), 108 L. T. 728; 29 T. L. R. 492	145
— <i>v. Nightingale</i> (1726), 4 Bro. P. C. 193	131
— <i>v. Rostron</i> (1842), 9 M. & W. 411; 60 R. R. 770	259, 278
— <i>v. S. E. Ry.</i> (1870), L. R. 5 C. P. 640; 39 L. J. C. P. 346; 23 L. T. 14; 18 W. R. 1032	211
— <i>v. Smith</i> (1861), 29 Beav. 394; 131 R. R. 637	90
— <i>v. Walker</i> (1897), 76 L. T. 234	26, 99
<i>Wall v. Cockerell</i> (1863), 10 H. L. C. 229; 32 L. J. Ch. 276; 9 Jur. 447; 8 L. T. 1; 11 W. R. 442; 138 R. R. 124	39
<i>Wallace, Re</i> (1884), 14 Q. B. D. 22; 54 L. J. Q. B. 293; 51 L. T. 551; 33 W. R. 66...	51
— <i>v. Roe</i> , [1903] 1 Ir. R. 32	51, 62
— <i>v. Woodgate</i> (1824), R. & M. 193; 1 C. & P. 575	162
<i>Waller v. Drakeford</i> (1853), 1 E. & B. 749; 22 L. J. Q. B. 274; 93 R. R. 377	167
— <i>v. Holmes</i> (1860), 1 J. & H. 239; 3 L. T. 289; 30 L. J. Ch. 24; 9 W. R. 32; 6 Jur. 1367; 128 R. R. 344	73, 161
<i>Wallis v. Biddick</i> (1873), 22 W. R. 76	23
<i>Walsh v. Whitcomb</i> (1797), 2 Esp. 565	275
<i>Walsham v. Stainton</i> (1863), 12 W. R. 63; 2 H. & M. 1; 9 L. T. 603; 3 N. R. 1; 144 R. R. 1	91
<i>Walshe v. Provan</i> (1853), 1 C. L. R. 823; 8 Ex. 843; 22 L. J. Ex. 355; 91 R. R. 795	149
<i>Walter v. James</i> (1871), L. R. 6 Ex. 124; 40 L. J. Ex. 104; 24 L. T. 188; 19 W. R. 472	39
— <i>v. King</i> (1897), 13 T. L. R. 270	139, 141
<i>Waltho v. Brooks</i> (1885), 1 T. L. R. 565	57
<i>Ward, Ex p.</i> (1873), L. R. 8 Ch. 144; 42 L. J. Bk. 17	228
— <i>Re</i> (1862), 31 Beav. 1	208
— <i>v. Carttar</i> (1865), L. R. 1 Eq. 29; 30 Beav. 171; 147 R. R. 95	82
— <i>v. Felton</i> (1801), 1 East, 507	237
— <i>v. G. O. Co.</i> (1873), 42 L. J. C. P. 265; 28 L. T. 850	210
— <i>v. Haddrill</i> , [1904] 1 K. B. 399; 73 L. J. K. B. 277; 90 L. T. 232; 52 W. R. 398	155
— <i>v. Sharp</i> (1883), 53 L. J. Ch. 313; 50 L. T. 557	87, 91, 10f
— <i>v. Shew</i> (1833), 9 Bing. 608; 2 Moo. & S. 756; 2 L. J. C. P. 58; 35 R. R. 640...	52
— <i>v. Stuart</i> (1856), 1 C. B. 88; 107 R. R. 582	118
<i>Wardell v. Kent C. C.</i> , [1938] 2 K. B. 768; 108 L. J. K. B. 350; 159 L. T. 337; 54 T. L. R. 1026; [1938] 3 All E. R. 473	215

TABLE OF CASES.

lxxxv

	PAGE
Ware & De Freville v. Motor Trades Assocn., [1921] 3 K. B. 40; 90 L. J. K. B. 949; 37 T. L. R. 213	217
Waring v. Favenok (1807), 1 Camp. 85; 10 R. R. 638	195
Warlow v. Harrison (1858), 1 E. & E. 295, 309; 29 L. J. Q. B. 14; 117 R. R. 219 ...	99, 136, 239, 283
Warmingtons v. McMurray (1937), 81 S. J. 178; 53 T. L. R. 395; [1937] 1 All E. R. 562	126
Warner v. M'Kay (1836), 1 M. & W. 591; 2 Gale, 86	204
— v. Nelson (1936), 155 L. T. 538; 80 S. J. 855; 53 T. L. R. 14; 3 All E. R. 160; [1937] 1 K. B. 209; 106 L. J. K. B. 97	19
Warr v. Jones (1876), 24 W. R. 695	255
Warren, <i>Ex p.</i> (1885), 1 T. L. R. 430	226
— v. Agdeshman (1922), 38 T. L. R. 588	128
Warrington v. Windhill, etc. Socy. (1918), 118 L. T. 505; 82 J. P. 149	288
Warwick v. Slade (1811), 3 Camp. 127; 13 R. R. 772	144, 283
Warwicke v. Noakes (1790), 1 Peake, 98; 3 R. R. 653	103
Waters v. Shaftesbury (1866), 14 L. T. 184; 14 W. R. 572	87, 165
Watkin v. Lamb (1901), 85 L. T. 483	168, 172, 184
Watson, <i>Re</i> , [1904] 2 K. B. 753; 73 L. J. K. B. 854; 11 Manson, 256; 20 T. L. R. 727	230
— v. Davies, [1931] 1 Ch. 455; 100 L. J. Ch. 87; 144 L. T. 545	37
— v. Hetherington (1843), 1 C. & K. 36; 70 R. R. 775	169
— v. King (1815), 1 Stark. 121; 4 Camp. 272; 16 R. R. 790	276
— v. Lyon (1855), 24 L. J. Ch. 754; 7 De G. M. & G. 288; 109 R. R. 122	163
— v. Murrel (1824), 1 C. & P. 307; 28 R. R. 779	236
— v. Rodwell (1879), 11 Ch. D. 150; 48 L. J. Ch. 209; 27 W. R. 265	91
— v. Swann (1862), 11 C. B. 756; 31 L. J. C. P. 210; 132 R. R. 760	35, 36
— v. Threlkeld (1794), 2 Esp. 637; 5 R. R. 760	29
— v. Woodman (1875), L. R. 20 Eq. 721; 45 L. J. Ch. 57	220
Watt v. Grove (1805), 2 Sch. & Lef. 492	88
Watteau v. Fenwick, [1893] 1 Q. B. 346; 67 L. T. 831; 9 T. L. R. 133; 56 J. P. 839	53, 170, 173
Watts v. Christie (1849), 11 Beav. 546; 18 L. J. Ch. 173; 83 R. R. 259	157
Waud, <i>Re</i> (1868), 17 W. R. 64	189
Way and Waller, Ltd. v. Ryde, [1944] 1 All E. R. 9; 60 T. L. R. 185	120
— v. Verrall, [1939] 3 All E. R. 533; 161 L. T. 86	127
Weare v. Brimsdown Lead Co. (1910), 103 L. T. 429	124
Weary v. Alderson (1837), 2 M. & Rob. 127	63, 71
Webb v. Rhodes (1837), 6 L. J. C. P. 212; 3 Bing. N. C. 732; 4 Scott, 497; 3 Hodges, 128; 1 Jur. 41; 43 R. R. 790	124
— v. Smith (1885), 30 Ch. D. 192; 55 L. J. Ch. 343; 53 L. T. 737	259
Webber v. Granville (1860), 30 L. J. C. P. 92; 7 Jur. 420; 126 R. R. 882	53
Webster v. De Tastet (1797), 7 T. R. 157; 4 R. R. 402	107
— v. Seekamp (1821), 4 B. & A. 352; 23 R. R. 307	66
Weddle v. Hackett, [1929] 1 K. B. 321; 98 L. J. K. B. 243; 140 L. T. 303; 45 T. L. R. 67	143
Wedlake v. Hurley (1830), 1 C. & J. 83; L. & W. 330; 35 R. R. 688	260
Weeks v. Goode (1859), 6 C. B. 367; 120 R. R. 164	163
— v. Propert (1873), L. R. 8 C. P. 427; 42 L. J. C. P. 129; 21 W. R. 676	250, 253
Weidner v. Hoggett (1876), 1 C. P. D. 533; 35 L. T. 368	186
Weigall v. Runciman (1916), 85 L. J. K. B. 1187; 115 L. T. 61	48
Weiner v. Harris, [1910] 1 K. B. 285; 79 L. J. K. B. 342; 101 L. T. 647; 26 T. L. R. 96	3, 4, 182
Weir, <i>Re</i> (1888), 58 L. T. 792	225
— v. Bell (1878), 3 Ex. D. 238; 47 L. J. Ex. 704; 38 L. T. 929; 26 W. R. 746	273

	PAGE
Weld-Blundell v. Stephens, [1920] A. C. 956; 89 L. J. K. B. 705; 123 L. T. 593; 36 T. L. R. 640	107
Wellfield v. Adamson (1884), 5 Asp. M. C. 214; 50 L. T. 511	65
Wells, <i>Re</i> (1895), 72 L. T. 359	136
— v. Smith, [1914] 3 K. B. 722; 30 T. L. R. 722; 111 L. T. 809	222
— v. Wells, [1914] P. 157; 83 L. J. P. 81; 111 L. T. 399; 58 S. J. 555; 30 T. L. R. 545	119
Welsbach, etc. Co. v. New Sunlight, etc. Co., [1900] 2 Ch. 1; 69 L. J. Ch. 546; 83 L. T. 58; 48 W. R. 595	221, 222
Welsh v. Roe (1918), 87 L. J. K. B. 520; 118 L. T. 529; 34 T. L. R. 187	63
Welstead v. Levy (1831), 1 M. & Rob. 138	266
Wenham, <i>Ex p.</i> (1872), 21 W. R. 104	62, 63
Wentworth v. Lloyd (1864), 10 H. L. C. 589; 32 Beav. 467; 138 R. R. 824	89
West Devon Mine, <i>Re</i> (1888), 38 Ch. D. 51; 57 L. J. Ch. 850; 58 L. T. 61; 36 W. R. 342; 4 T. L. R. 297	63
West of England Bank v. Batchelor (1882), 51 L. J. Ch. 199; 46 L. T. 132; 30 W. R. 364	163
West London Bank v. Kitson (1884), 13 Q. B. D. 360; 53 L. J. Q. B. 345; 50 L. T. 656; 32 W. R. 757	251
Westacott v. Bevan, [1891] 1 Q. B. 774; 60 L. J. Q. B. 536; 65 L. T. 263; 7 T. L. R. 290; 39 W. R. 363	155
Wester Moffat Colly. Co. v. Jeffrey, [1911] S. C. 346	202
Western Bank of Scotland v. Addie (1867), L. R. 1 H. L. 145	199
Weston's Case (1879), 10 Ch. D. 579; 48 L. J. Ch. 425; 40 L. T. 43; 27 W. R. 310... ..	113
Westropp v. Solomon (1849), 8 C. B. 345; 19 L. J. C. P. 1; 79 R. R. 530	140
Westwood v. Bell (1815), 4 Camp. 349; 16 R. R. 800	147, 160
Wetherall, <i>Ex p.</i> (1876), 4 Ch. D. 49; 46 L. J. Ch. 39	231
Whaley Bridge Calico Co. v. Green (1879), 5 Q. B. D. 109; 49 L. J. Q. B. 326; 41 L. T. 674; 28 W. R. 351	95
Wharton v. Walker (1825), 6 D. & R. 288; 4 B. & C. 163	259
Whatman v. Pearson (1868), L. R. 3 C. P. 422	209
Wheatley v. Patrick (1837), 6 L. J. Ex. 193; 2 M. & W. 650; 46 R. R. 731	207
— v. Smithers, [1906] 2 K. B. 321; 75 L. J. K. B. 627; 95 L. T. 96; 54 W. R. 537; 22 T. L. R. 591; 50 S. J. 513; [1907] 2 K. B. 684	10
Wheeler, <i>Re</i> (1933), 102 L. J. Ch. 341; B. & C. R. 124	229
Whitcomb v. Minchin (1820), 5 Madd. 91	85
White, <i>Ex p.</i> (1870), L. R. 6 Ch. 397; 40 L. J. Bk. 73; 24 L. T. 45; 19 W. R. 488... ..	3
— v. Bayley (1861), 10 C. B. 227; 30 L. J. C. P. 253; 7 Jur. 948; 128 R. R. 681	82
— v. Benekendorff (1873), 29 L. T. 475	166
— v. Boby (1878), 37 L. T. 652; 26 W. R. 133	19
— v. Chapman (1815), 1 Stark. 113	132
— v. Cuyler (1795), 6 T. R. 176; 1 Esp. 200; 3 R. R. 147	76
— v. Lincoln (1803), 8 Ves. 363; 7 R. R. 71	133
— v. Proctor (1811), 4 Taunt. 209; 13 R. R. 580	5, 13, 62, 70
— v. Turnbull (1898), 78 L. T. 726; 8 Asp. M. C. 406	126, 128
Whitechurch v. Cavanagh, [1902] A. C. 117; 71 L. J. K. B. 400; 85 L. T. 349; 50 W. R. 218; 9 Manson, 351	172
Whitcomb v. Jacob, 1 Salk. 160	229
Whitehaven Bank v. Reed (1886), 2 T. L. R. 353	250, 253
Whitehead v. Greetham (1825), 2 Bing. 464; 10 Moo. 183; M'Clel. & Y. 205.....	79, 108
— v. Lord (1852), 7 Ex. 691; 21 L. J. Ex. 239; 86 R. R. 797	100, 126, 133, 280
— v. Taylor (1839), 10 A. & E. 210; 2 P. & D. 367; 4 Jur. 247; 50 R. R. 385 ..	34, 38, 43
— v. Tuckett (1812), 15 East, 400; 13 R. R. 509	168
Whitehouse v. Abberley (1845), 1 C. & K. 642	220
Whiteley, <i>Re</i> . See Whitley Partners, <i>Re</i> .	

	PAGE
<i>Whiteley v. Pepper</i> (1876), 2 Q. B. D. 276; 46 L. J. Q. B. 436; 36 L. T. 588; 25 W. R. 607.....	208
<i>Whiteman v. Hawkins</i> (1878), 4 C. P. D. 13; 39 L. T. 629; 27 W. R. 262.....	110
<i>Whitfield v. Brand</i> (1847), 16 M. & W. 282; 73 R. R. 502.....	230
— <i>v. S. E. Ry.</i> (1858), E. B. & E. 115; 27 L. J. Q. B. 229; 4 Jur. 688; 113 R. R. 568.....	217, 288
<i>Whitley Partners, Re</i> (1886), 32 Ch. D. 337; 55 L. J. Ch. 540; 54 L. T. 912; 34 W. R. 506; 2 T. L. R. 541.....	8, 30
<i>Whitlock, Re</i> (1893), 63 L. J. Q. B. 245; 70 L. T. 34.....	281
<i>Whittaker v. Forshaw</i> , [1919] 2 K. B. 419; 88 L. J. K. B. 989; 121 L. T. 320; 35 T. L. R. 487; 83 J. P. 210.....	287
— <i>v. L. C. C.</i> , [1915] 2 K. B. 676; 84 L. J. K. B. 1446; 113 L. T. 544; 31 T. L. R. 412.....	216
<i>Whitting, Re</i> (1879), 10 Ch. D. 615; 48 L. J. Bk. 79; 40 L. T. 179; 27 W. R. 385..	258
<i>Whitwell v. Perrin</i> (1858), 4 C. B. 412; 114 R. R. 785.....	196
<i>Whitwood Chemical Co. v. Hardman</i> , [1891] 2 Ch. 416; 60 L. J. Ch. 428; 64 L. T. 716; 39 W. R. 433.....	19
<i>Whurr v. Devenish</i> (1904), 20 T. L. R. 385.....	199, 200
<i>Whyte v. Nutting</i> , [1897] 2 Ir. R. 241.....	64
<i>Wickens v. Townshend</i> (1830), 1 Russ. & M. 361; 32 R. R. 221.....	151
<i>Wickham v. Wickham</i> (1855), 2 Kay & J. 487; 110 R. R. 328.....	3
<i>Wiggins v. Peppin</i> (1837), 2 Beav. 403; 3 Jur. 721; 50 R. R. 217.....	31
<i>Wilde v. Gibson</i> (1848), 1 H. L. C. 605; 73 R. R. 191.....	200, 222
— <i>v. Walford</i> (1884), 53 L. J. Ch. 505; 51 L. T. 441.....	166
<i>Wilkinson v. Alston</i> (1879), 48 L. J. Q. B. 733; 41 L. T. 394.....	121
— <i>v. Candlish</i> (1850), 5 Ex. 91; 19 L. J. Ex. 166; 82 R. R. 588.....	64
— <i>v. Coverdale</i> (1793), 1 Esp. 75; 53 R. R. 256.....	107
— <i>v. Martin</i> (1837), 8 C. & P. 1.....	121, 123
<i>Wilks v. Back</i> (1802), 2 East, 142; 6 R. R. 409.....	76
<i>Willard v. Whiteley, Ltd.</i> , [1938] 3 All E. R. 779.....	213
<i>William Safford, The</i> (1860), Lush. 69.....	166
<i>Williams, Re</i> (1865), 12 L. T. 785.....	51, 63
— <i>v. Admiralty</i> (Lords Commissioners) (1851) 11 C. B. 420; 20 L. J. C. P. 245...	235
— <i>v. Barton</i> , [1927] 2 Ch. 9; 96 L. J. Ch. 355; 137 L. T. 294; 71 S. J. 370; 43 T. L. R. 446.....	94
— <i>v. Evans</i> (1866), L. R. 1 Q. B. 352; 35 L. J. Q. B. 111; 13 L. T. 753; 14 W. R. 330.....	47, 62, 75, 205
— <i>v. Everett</i> (1811), 14 East, 582; 13 R. R. 315.....	260
— <i>v. Fowler</i> (1825), M'Clel. & Y. 269.....	27
— <i>v. Gibbs</i> (1836), 5 Ad. & E. 208; 6 N. & M. 788; 2 H. & W. 241; 44 R. R. 404...	109
— <i>v. Holmes</i> (1853), 8 Ex. 861; 22 L. J. Ex. 283; 91 R. R. 802.....	231
— <i>v. Innes</i> (1808), 1 Camp. 364; 10 R. R. 702.....	221
— <i>v. Jones</i> (1865), 3 H. & C. 602; 11 Jur. 843; 13 L. T. 300; 13 W. R. 1023; 140 R. R. 631.....	210
— <i>v. Lister</i> (1913), 109 L. T. 699.....	136, 137
— <i>v. Mason</i> (1873), 28 L. T. 232; 21 W. R. 386.....	7, 219
— <i>v. Millington</i> (1788), 1 H. Bl. 81; 2 R. R. 724.....	147, 239, 262
— <i>v. North China Ass. Co.</i> (1876), 1 C. P. D. 757; 35 L. T. 884.....	33, 37
— <i>v. Pigott</i> (1848), 2 Ex. 201; 17 L. J. Ex. 196.....	16
— <i>v. Potts</i> (1871), L. R. 12 Eq. 149; 40 L. J. Ch. 775.....	83
— <i>v. Shadbolt</i> (1885), 1 T. L. R. 417.....	263
— <i>v. Stevens</i> (1866), L. R. 1 P. C. 362; 36 L. J. P. C. 21; 4 Moo. P. C. 235; 15 W. R. 409.....	93
— <i>v. Trye</i> (1854), 23 L. J. Ch. 860; 18 Beav. 366; 18 Jur. 442; 2 W. R. 314; 104 R. R. 468.....	91
— <i>v. Williams</i> (1891), 17 Ch. D. 437.....	273
— <i>v. —</i> (1937), 81 S. J. 435; [1937] 2 All E. R. 559.....	35

	PAGE
Williamson v. Barbour (1877), 9 Ch. D. 529; 50 L. J. Ch. 147; 37 L. T. 698	85, 92
— v. Barton (1862), 7 H. & N. 899; 31 L. J. Ex. 170; 5 L. T. 800; 8 Jur. 341; 10 W. R. 321; 126 R. R. 751	237, 248
— v. Hine, [1891] 1 Ch. 390; 60 L. J. Ch. 123; 63 L. T. 682; 39 W. R. 239; 7 T. L. R. 130	94
— v. Page (1844), 1 C. & K. 581	66
Willis v. Baddeley, [1892] 2 Q. B. 324; 61 L. J. Q. B. 769; 67 L. T. 206; 40 W. R. 577 ..	266
— v. Barron, [1902] A. C. 171; 71 L. J. Ch. 609; 86 L. T. 805	100, 101
— v. Joyce (1911), 104 L. T. 576; 16 Com. Cas. 190; 27 T. L. R. 388	284
— v. Palmer (1860), 7 C. B. 340; 29 L. J. C. P. 194; 6 Jur. 732; 8 W. R. 295; 121 R. R. 522	49
Willson v. Smyth (1831), 1 B. & Ad. 801	26
Wilmot v. Smith (1828), 3 C. & P. 453; Moo. & M. 238; 81 R. R. 732	169
Wilson, <i>Ex p.</i> , [1904] 2 K. B. 68; 73 L. J. K. B. 413; 91 L. T. 46; 52 W. R. 437; 11 Manson, 113; 20 T. L. R. 377	76, 228
—, <i>Re</i> , [1916] 1 K. B. 382; 85 L. J. K. B. 329; 114 L. T. 32; 32 T. L. R. 86	6
— v. Anderton (1830), 9 L. J. (o.s.) K. B. 48; 1 B. & Ad. 450; 35 R. R. 348	272
— v. Baker (1901), 17 T. L. R. 473	248
— v. Barker (1833), 4 B. & Ad. 614; 1 N. & M. 409	35
— v. Barthrop (1837), 2 M. & W. 863	242
— v. Brett (1843), 12 L. J. Ex. 264; 11 M. & W. 113; 63 R. R. 528	78, 79, 108
— v. Bury (1880), 5 Q. B. D. 518; 50 L. J. Q. B. 90; 44 L. T. 454; 29 W. R. 269... ..	236
— v. Ford (1868), L. R. 3 Ex. 63; 37 L. J. Ex. 60; 17 L. T. 605; 16 W. R. 482... ..	25, 26
— v. Glossop (1888), 20 Q. B. D. 354; 57 L. J. Q. B. 161; 58 L. T. 707; 36 W. R. 296; 4 T. L. R. 239	28
— v. Harper, [1908] 2 Ch. 370; 77 L. J. Ch. 607; 99 L. T. 391	124
— v. Hart (1817), 1 Moo. 45; 7 Taunt. 295	186
— v. Kymer (1813), 1 M. & S. 157; 52 R. R. 812	237
— v. Millar (1816), 2 Stark. 1; 19 R. R. 670	67
— v. Moore (1834), 1 Myl. & K. 127, 337; 36 R. R. 272	273
— v. Murphy (1937), 81 S. J. 139; 53 T. L. R. 308; 1 All E. R. 315	287
— v. Poulter (1724), 2 Str. 859	41, 44
— v. Salamandra Ass. Co. (1903), 88 L. T. 96; 8 Com. Cas. 129; 9 Asp. M. C. 370... ..	226
— v. Short (1847), 6 Hare, 366; 17 L. J. Ch. 289; 77 R. R. 139	85, 98
— v. Tunman (1843), 6 M. & G. 236; 6 Scott, N. R. 894; 64 R. R. 770; 1 D. & L. 513; 12 L. J. C. P. 306	33, 35, 43
— v. Turner (1808), 1 Taunt. 398; 9 R. R. 797	221
— v. United Counties Bank, Ltd., [1920] A. C. 102; 88 L. J. K. B. 1033; 122 L. T. 76	111
— v. West Hartlepool Ry. (1864), 34 Beav. 187; 34 L. J. Ch. 241; 11 L. T. 327; 13 W. R. 4; 10 Jur. 1065; 139 R. R. 194	18, 41
Wilsons and Furness-Leyland Line v. British and Continental Shipping Co. (1907), 23 T. L. R. 397	228
Wilts and Dorset Bank v. Cook (1889), 5 T. L. R. 703	105
Wiltshire v. Sims (1808), 1 Camp. 258; 10 R. R. 673	46, 56, 61, 75, 173
Winch v. Winchester (1812), 1 V. & B. 375; 12 R. R. 238	200
Wing v. Harvey (1854), 5 De G. M. & G. 265; 23 L. J. Ch. 511; 2 W. R. 370; 104 R. R. 112	170
Wingfield, <i>Ex p.</i> (1879), 10 Ch. D. 591; 40 L. T. 15; 27 W. R. 346	230
—, <i>Re</i> , [1904] 2 Ch. 665; 73 L. J. Ch. 797; 91 L. T. 783	23, 26
— v. Wingfield, [1919] 1 Ch. 462; 88 L. J. Ch. 229; 120 L. T. 588; 35 T. L. R. 308... ..	152
Wise v. Perpetual Trustee Co., [1903] A. C. 139; 72 L. J. P. C. 31; 87 L. T. 569; 51 W. R. 241; 19 T. L. R. 125	16
Withington v. Herring (1829), 5 Bing. 442; 7 L. J. (o.s.) C. P. 172; 3 M. & P. 30... ..	49
Witt, <i>Re</i> (1876), 2 Ch. D. 489; 45 L. J. Bk. 118; 34 L. T. 785	147
Wolfe v. Findlay (1847), 6 Hare, 66; 16 L. J. Ch. 241; 77 R. R. 16	115

Wolff v. Horncastle (1798), 1 B. & P. 316; 4 R. R. 808	33, 44
Wolstenholm v. Sheffield Union Bank (1886), 54 L. T. 746; 2 T. L. R. 472	149
Wood, <i>Re, ex p. Boden</i> (1873), 28 L. T. 174	229
—, <i>Re, ex p. Wenham</i> (1872), 21 W. R. 104	62, 63
— v. Argyll (1844), 6 M. & G. 928; 13 L. J. C. P. 96	16
— v. Baxter (1883), 49 L. T. 45	238
— v. Fevez (1898), 14 T. L. R. 492	143
— v. Finch (1861), 2 F. & F. 447	19
— v. Jones (1889), 61 L. T. 551	103
— v. Rowcliffe (1846), 6 Hare, 191; 77 R. R. 68	181
— v. Tassell (1844), 6 Q. B. 234; 66 R. R. 374	83
— v. Turner, [1907] 2 Ch. 126, 539; 76 L. J. Ch. 492; 96 L. T. 798; 23 T. L. R. 524	152
Woodin v. Burford (1834), 2 C. & M. 391; 4 Tyr. 264; 3 L. J. Ex. 75; 39 R. R. 802...	52
Woodley v. Coventry (1863), 32 L. J. Ex. 185; 8 L. T. 249; 11 W. R. 599; 9 Jur. 548; 133 R. R. 633	83
Woodward v. Wolfe (1936), 80 S. J. 976; 53 T. L. R. 87; 3 All E. R. 529	143
Wookey v. Pole (1820), 4 B. & A. 1; 22 R. R. 594	178
Woolfe v. Horne (1877), 2 Q. B. D. 355; 46 L. J. Q. B. 534; 36 L. T. 705; 25 W. R. 728	239
Woollen v. Wright (1862), 1 H. & C. 554; 31 L. J. Ex. 513; 7 L. T. 73; 10 W. R. 715; 130 R. R. 658	35
Worcester, <i>Re</i> (1868), L. R. 3 Ch. 555; 37 L. J. Bk. 23; 18 L. T. 866	222
Worrall v. Harford (1802), 8 Ves. 4	157
— v. Johnson (1820), 2 J. & W. 214; 22 R. R. 106	151
Wray, <i>Re</i> (1887), 36 Ch. D. 138; 56 L. J. Ch. 1106; 57 L. T. 605	116
— v. Kemp (1883), 26 Ch. D. 169; 53 L. J. Ch. 1020; 50 L. T. 552	71
Wreford, <i>Re</i> (1897), 13 T. L. R. 153	228, 229
Wren v. Kirtton (1805), 11 Ves. 377; 8 R. R. 174	104
Wright v. Annandale, [1930] 2 K. B. 8; 99 L. J. K. B. 444; 143 L. T. 452; 46 T. L. R. 402	27
— v. Bigg (1852), 15 Beav. 592; 92 R. R. 568	167
— v. Carter, [1903] 1 Ch. 27; 72 L. J. Ch. 138; 87 L. T. 624; 51 W. R. 196	89, 90, 101
— v. Castle (1817), 3 Meriv. 12; 17 R. R. 3	64
— v. Dannah (1809), 2 Camp. 203; 11 R. R. 693	5
— v. Freeman (1879), 48 L. J. C. P. 276; 40 L. T. 134, 358	165
— v. Glyn, [1902] 1 K. B. 745; 71 L. J. K. B. 497; 86 L. T. 373; 50 W. R. 402...	17, 54
— v. Mills (1890), 63 L. T. 186	260
— v. Proud (1806), 13 Ves. 138; 53 R. R. 22	90
— v. Woollen (1862), 1 H. & C. 554; 31 L. J. Ex. 513; 7 L. T. 73, Ex. Ch.; 10 W. R. 715; 130 R. R. 658	35
Wright's Trust, <i>Re</i> , [1901] 1 Ch. 317; 70 L. J. Ch. 119; 83 L. T. 515	153
Wrouth v. Dawes (1858), 25 Beav. 369; 27 L. J. Ch. 635; 119 R. R. 454; 4 Jur. 396...	47
Wucherer, <i>Ex p.</i> (1832), 2 Dea. & Ch. 37	229
Wyatt v. Hertford (1802), 3 East, 147	198
Wych v. Neal (1734), 3 P. Wms. 310	268
Wyld v. Hopkins (1846), 15 M. & W. 517; 16 L. J. Ex. 25; 71 R. R. 751	16
Wylde v. Radford (1864), 33 L. J. Ch. 51; 9 L. T. 471; 12 W. R. 38	151
Wyllie v. Pollen (1803), 32 L. J. Ch. 782; 3 D. J. & S. 596; 11 W. R. 1081; 9 L. T. 71	225
Wythes v. Labouchere (1859), 3 De G. & J. 593; 5 Jur. 499; 7 W. R. 271; 121 R. R. 238	222
XENOS v. Wickham (1866), L. R. 2 H. L. 296; 36 L. J. C. P. 313; 16 L. T. 800; 16 W. R. 38	61, 174

	PAGE
YARBOROUGH <i>v.</i> Bank of England (1812), 16 East, 6; 14 R. R. 272	215
Yates <i>v.</i> Dalton (1858), 28 L. J. Ex. 69; 118 R. R. 896	10
— <i>v.</i> Farebrother (1819), 4 Madd. 239	98
— <i>v.</i> Freckleton (1781), 2 Doug. 623	63
— <i>v.</i> Hoppe (1850), 9 C. B. 541; 19 L. J. P. C. 180; 82 R. R. 429	278
Yglesias, <i>Re</i> (1875), L. R. 10 Ch. 639; 32 L. T. 677; 23 W. R. 780	150
Yonge <i>v.</i> Tonybee, [1910] 1 K. B. 215; 79 L. J. K. B. 208; 102 L. T. 57; 26 T. L. R. 211	252
York, etc. Ry. <i>v.</i> Hudson (1853), 16 Beav. 485; 22 L. J. Ch. 529; 96 R. R. 228.....	95
Young <i>v.</i> Cole (1837), 3 Bing. 724; 4 Scott, 489; 3 Hodges, 126; 6 L. J. C. P. 201; 1 Jur. 22; 43 R. R. 783	56, 59, 140
— <i>v.</i> English (1843), 7 Beav. 10; 64 R. R. 5	158
— <i>v.</i> Grote (1827), 4 Bing. 253; 12 Moo. 484; 5 L. J. (o.s.) C. P. 165; 29 R. R. 552	145
— <i>v.</i> Payne. <i>See Re Payne.</i>	
— <i>v.</i> Schuler (1883), 11 Q. B. D. 651; 49 L. T. 546	246
— <i>v.</i> White (1844), 7 Beav. 506; 13 L. J. Ch. 418; 64 R. R. 135	202
— <i>v.</i> — (1912), 28 T. L. R. 87; 76 J. P. 14	195
— <i>v.</i> Wright (1807), 1 Camp. 140	221
 ZINCK <i>v.</i> Walker (1777), W. Bl. 1154	 230
Zouch <i>v.</i> Parsons (1765), 3 Burr. 1794, 1804	4
Zuleuta <i>v.</i> Vinent (1851), 1 De G. M. & G. 315; 91 R. R. 101	83
Zulueta's Claim (1870), L. R. 5 Ch. 444; 39 L. J. Ch. 598; 18 W. R. 778.....	185
Zwilchenbart <i>v.</i> Alexander (1860), 1 B. & S. 234; 30 L. J. Q. B. 254; 4 L. T. 412; 9 W. R. 670; 7 Jur. 1157; 124 R. R. 536	78, 98

A DIGEST

OF

THE LAW OF AGENCY

CHAPTER I.

PRELIMINARY.

Article 1.

INTERPRETATION OF TERMS.

IN this book, unless a contrary intention appears from the context—

“ Public agent ” means an agent of the Crown or Government;

“ Agent ” does not include public agent;

“ Home agent ” means an agent residing and carrying on business as such in England or Wales;

“ Undisclosed principal ” means a principal who is not known to be such by the person dealing with an agent;

“ Foreign principal ” means a principal who does not reside or carry on business in England or Wales;

“ Third person ” means any person other than the principal or agent;

“ Goods and chattels ” includes all chattels personal;

“ Property ” includes every description of property, whether real or personal.

CHAPTER II.

THE RELATION OF AGENCY.

Article 2.

DEFINITIONS.

AN agent is a person having express or implied authority to represent or act on behalf of another person, who is called his principal (a).

A general agent is an agent who has authority—

- (a) to act for his principal in all matters, or in all matters concerning a particular trade or business, or of a particular nature; or
- (b) to do some act in the ordinary course of his trade, profession or business as an agent, on behalf of his principal; *e.g.*, where a solicitor, factor or broker is employed as such (b).

A special agent is an agent who has only authority to do some particular act, or represent his principal in some particular transaction, such act or transaction not being in the ordinary course of his trade, profession, or business as an agent (b).

A factor is a mercantile agent whose ordinary course of business is to sell or dispose of goods, of which he is intrusted with the possession or control by his principal (c).

A mercantile agent, within the meaning and for the purposes of the Factors Act, 1889 (d), is a mercantile agent having, in

(a) The difference between an agent and an independent contractor is, that an agent is bound to act in the matter of the agency subject to the directions and control of the principal, whereas an independent contractor merely undertakes to perform certain specified work, or produce a certain specified result, the manner and means of performance or production being left to his discretion, except so far as they are specified by the contract: see *Quarman v. Burnett* (1840), 6 M. & W. 499; *Reedie v. L. & N. W. Ry.* (1849), 4 Ex. 244; *Hughes v. Percival* (1883), 8 App. Cas. 443; *Dalton v. Angus* (1881), 6 App. Cas. 740, H. L.; *Jolliffe v. Woodhouse* (1894), 10 T. L. R. 553, C. A.; *Lemaitre v. Davis* (1881), 19 Ch. D. 281; *Black v. Christchurch Finance Co.*, [1894] A. C. 48, H. L.; *Holliday v. National Telephone Co.*, [1899] 2 Q. B. 392, C. A.; *Hall v. Lees*, [1904] 2 K. B. 602, C. A.; *Smith v. General Motor Car Co., Ltd.*, [1911] A. C. 118; 80 L. J. K. B. 839, H. L.; *Hurlstone v. London Electric Ry.* (1914), 30 T. L. R. 398, C. A.; *Performing Right Society, Ltd. v. Mitchell, &c., Ltd.*, [1924] 1 K. B. 762; 93 L. J. K. B. 306.

(b) See *Smith v. M'Guire* (1858), 3 H. & N. 554; 27 L. J. Ex. 465; *Brady v. Todd* (1861), 9 C. B. (N.S.) 592; 30 L. J. C. P. 223; *Barrett v. Irvine*, [1907] 2 Ir. R. 462, C. A. The distinction between general and special agents is only of importance in determining the nature and extent of the authority conferred. See Articles 36 to 39.

(c) *Baring v. Corrie* (1818), 2 B. & A. 137; *Stevens v. Biller* (1883), 25 Ch. D. 31; 53 L. J. Ch. 249, C. A.

(d) 52 & 53 Vict. c. 45, s. 1. A servant or shopman is not a mercantile agent: *Lowther v. Harris*, [1927] 1 K. B. 393; 96 L. J. K. B. 170; *Cole v. North Western Bank* (1875), L. R. 10 C. P. 354; 44 L. J. C. P. 233; *Lamb v. Attenborough* (1862), 1 B. & S. 131; 31 L. J. Q. B. 41; *Heyman v. Flewker* (1863), 13 C. B. (N.S.) 519; 32 L. J. C. P. 132; but a

the customary course of his business as such agent, authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods (*d*).

A broker is an agent whose ordinary course of business is to negotiate and make contracts for the sale and purchase of goods and other property, of which he is not intrusted with the possession or control (*e*).

An auctioneer is an agent whose ordinary course of business is to sell by public auction goods or other property, of which he may or may not be intrusted with the possession or control.

A *del credere* agent is a mercantile agent who, in consideration of extra remuneration, called a *del credere* commission, guarantees to his principal that third persons with whom he enters into contracts on behalf of the principal shall duly pay any sums becoming due under those contracts (*d*).

In effect, a *del credere* agent is a surety for the persons with whom he deals (*d*). But an agreement by an agent to sell on a *del credere* commission is not a promise to answer for the debt, default, or miscarriage of another person, within the meaning of the fourth section of the Statute of Frauds (*f*), and it is not necessary that such an agreement should be in writing (*g*). A *del credere* agency may be inferred from a course of conduct between the parties (*h*).

The principal is not entitled to litigate with a *del credere* agent any disputes arising out of contracts made by him. The obligation of the agent is confined to answering for the failure by the other contracting parties, owing to insolvency or the like, to pay any ascertained sums which may become due from them as debts (*i*).

Distinction between del credere agent and purchaser.—Where goods were consigned by A to B for the purpose of sale, and it was agreed that B should have the right to sell at such prices and on such terms as he thought fit, and should pay an agreed price for the goods sold by him within a fixed period after the sale, it was held that the relation between A and B was that of buyer and seller, not that of principal and agent (*k*). But the mere

person may be employed as a mercantile agent although he has no general occupation as agent and is acting for one principal only, or in an isolated transaction: *Lowther v. Harris*, *supra*; *Weiner v. Harris*, [1910] 1 K. B. 285; 79 L. J. K. B. 342. See also *Turner v. Sampson* (1911), 27 T. L. R. 200; *Heap v. Motorists' Advisory Agency*, [1923] 1 K. B. 577; 92 L. J. K. B. 553; *Budberg v. Jerwood* (1934), 78 S. J. 878; Article 83.

(*d*) *Morris v. Cleasby* (1816), 4 M. & S. 566; *Hornby v. Lacy* (1817), 6 M. & S. 166; *Grove v. Dubois* (1786), 1 T. R. 112.

(*e*) See note (*c*), previous page.

(*f*) 29 Car. 2, c. 3.

(*g*) *Couturier v. Hastie* (1852), 22 L. J. Ex. 97; 8 Ex. 40; *Wickham v. Wickham* (1855), 2 Kay & J. 487; *Sutton v. Grey*, [1894] 1 Q. B. 285; 63 L. J. Q. B. 633, C. A.

(*h*) *Shaw v. Woodcock* (1827), 7 B. & C. 73.

(*i*) *Gabriel v. Churchill*, [1914] 3 K. B. 1272; 84 L. J. K. B. 733, C. A. Cf. *Nouvelles Huileries Anversoises v. Mann* (1924), 40 T. L. R. 804; *Churchill v. Goddard* (1935), 40 Com. Cas. 280.

(*k*) *Ex p. White, re Nevill* (1870), 40 L. J. Bk. 73; L. R. 6 Ch. 397. See also *Towle v. White* (1873), 29 L. T. 78, H. L.; *Livingstone v. Ross*, [1901] A. C. 327; 70 L. J. P. C. 58, P. C.; *Michelin Tyre Co. v. Macfarlane* (1917), 55 Sc. L. R. 35, H. L.; *Lamb v. Goring Brick Co.*, [1932] 1 K. B. 710; 101 L. J. K. B. 214.

fact that a person employed to sell goods is allowed by way of remuneration all the profit obtained by him over and above an agreed price, and that he guarantees the payment of that agreed price to the person employing him, does not prevent the relation between them being that of principal and agent, if it appear from the circumstances that their intention was to establish a *del credere* agency (*l*).

Article 3.

CAPACITY TO ACT AS PRINCIPAL.

Capacity to contract or do any other act by means of an agent is co-extensive with the capacity of the principal himself to make the contract or do the act which the agent is authorised to make or do. Provided that, where capacity to do a particular act exists only by virtue of a special custom, the act cannot be done by means of an agent unless the custom warrant its being so done (*m*).

An infant or lunatic is bound by a contract made by his agent with his authority, where the circumstances are such that he would have been bound if he had himself made the contract (*n*). On the other hand, a corporation or incorporated company has no capacity to appoint an agent for any purpose, or to do any act, beyond the scope of its charter or memorandum of association (*o*).

By the Law of Property Act, 1925, s. 129, a married woman, whether an infant or not, has power, as if she were unmarried and of full age, by deed to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do (*p*); and by the Law Reform (Married Women and Tortfeasors) Act, 1935 (*q*), s. 1, a married woman is capable of disposing of property and of rendering herself, and being rendered, liable in respect of any tort, contract, debt or obligation, and of suing and being sued, as if she were a *feme sole*.

(*l*) *Ex p. Bright, re Smith* (1879), 48 L. J. Bk. 81; 10 Ch. D. 566, C. A. See also *Weiner v. Harris*, [1910] 1 K. B. 285; 79 L. J. K. B. 342, C. A.

(*m*) *Combe's Case*, 9 Co. Rep. 75, where it was held that an infant had no power to appoint an attorney to make a feoffment on his behalf under the custom of gavelkind, though by virtue of the custom he had power to convey by feoffment himself. Modes of assurance by special custom were abolished by the Law of Property Act, 1922 (12 & 13 Geo. 5, c. 16), s. 128 (3).

(*n*) *R. v. Longnor* (1833), 4 B. & Ad. 647; *Drew v. Nunn* (1879), 48 L. J. Q. B. 591; 4 Q. B. D. 661, C. A.; *Elliott v. Ince* (1857), 7 De G. M. & G. 475; *Campbell v. Hooper* (1855), 24 L. J. Ch. 644; 3 Sm. & G. 153; *Ewer v. Jones* (1846), 16 L. J. Q. B. 42; 9 Q. B. 623; *Ex p. Bradbury, re Walden* (1839), Mont. & Ch. 625; *Daily Telegraph Newspaper Co. v. M'Laughlin*, [1904] A. C. 776, P. C.

(*o*) *Montreal Assurance Co. v. M'Gillivray* (1859), 13 Moo. P. C. C. 87; *Bateman v. Mid Wales Ry.* (1866), 35 L. J. C. P. 205; L. R. 1 C. P. 499; *Poullon v. L. & S. W. Ry.* (1867), 36 L. J. Q. B. 294; L. R. 2 Q. B. 534; *Ashbury Carriage Co. v. Riche* (1875), 44 L. J. Ex. 185; L. R. 7 H. L. 653.

(*p*) 15 Geo. 5, c. 20. Subject to this provision, a power of attorney given by an infant is void: *Zouch v. Parsons* (1765), 3 Burr. 1784, 1804.

(*q*) 25 & 26 Geo. 5, c. 30.

Article 4.

CAPACITY TO ACT AS AGENT.

All persons of sound mind, including infants and other persons with limited or no capacity to contract or act on their own behalf, are competent to contract or act as agents. Provided that—

- (a) no party to a contract is competent to sign a contract, or a note or memorandum thereof, as the agent of another party thereto, so as to satisfy the provisions of the Statute of Frauds, s. 4, the Sale of Goods Act, 1893, s. 4, or the Law of Property Act, 1925, s. 40 (r);
- (b) the personal liability of the agent upon the contract of agency, and upon any contract entered into by him with any third person (s), is dependent on his capacity to contract on his own behalf (t).

An act done by an agent, as such, is deemed to be the act of the principal who authorised it, the agent being looked upon merely as an instrument: hence the rule that a person having no capacity to contract on his own behalf is competent to contract on behalf of, and so as to bind, his principal. Where an agent, who was unable to read, was authorised to enter into and sign a contract on his principal's behalf, it was held that the principal could not avoid a written contract made by the agent, on the ground of his inability to read it (u).

The agent of one party to a contract is not incompetent to act as the agent of the other party thereto, where he can do so consistently with his duty to his principal. Thus, a broker frequently acts for both the buyer and the seller of goods, and an insurance broker may, though he does not necessarily, act as agent for the underwriters as well as the assured (x). The signature of a broker employed by both buyer and seller, or of an auctioneer, to a contract of sale, operates as the signature of both parties within the meaning of the Sale of Goods Act, 1893, s. 4, or of the Law of Property Act, 1925, s. 40 (y). And it has been held that a clerk or factor of one of the parties to a contract is competent to act as the agent of the other party for the same purpose (z).

(r) 29 Car. 2, c. 3; 56 & 57 Vict. c. 71; 15 Geo. 5, c. 20; *Sharman v. Brandt* (1871), 40 L. J. Q. B. 312; L. R. 6 Q. B. 720; *Wright v. Dannah* (1809), 2 Camp. 203; *Farebrother v. Simmons* (1822), 5 B. & A. 333.

(s) See Articles 115—124.

(t) *Smally v. Smally* (1700), 1 Eq. Cas. Ab. 6.

(u) *Foreman v. G. W. Ry.* (1878), 38 L. T. 851.

(x) *Shee v. Clarkson* (1810), 12 East, 507; 11 R. R. 473; *Empress Ass. Corpn. v. Bowring* (1906), 11 Com. Cas. 107; *Glasgow Ass. Corpn. v. Symondson* (1911), 104 L. T. 254.

(y) 56 & 57 Vict. c. 71; 15 Geo. 5, c. 20; *Thompson v. Gardiner* (1876), 1 C. P. D. 777; *Emmerson v. Heelis* (1809), 2 Taunt. 38; *White v. Proctor* (1811), 4 Taunt. 209; *Hinde v. Whitehouse* (1806), 7 East, 558.

(z) *Durrell v. Evans* (1862), 31 L. J. Ex. 337; 1 H. & C. 174, Ex. Ch.; *Bird v. Boulter* (1833), 4 B. & Ad. 443.

A Government does not act as the agent of any of its subjects in making a treaty, or in receiving reparations or other payments thereunder (a).

Article 5.

ACTS WHICH MAY BE DONE BY MEANS OF AN AGENT.

An agent may be appointed for the purpose of executing any deed, or making any contract, or doing any other act on behalf of the principal, which the principal might himself execute, make, or do; except for the purpose of exercising a power or authority conferred, or of performing a duty imposed (b), on the principal personally, the exercise or performance of which involves discretion or skill (c), or for the purpose of doing an act which the principal is required, by or pursuant to any statute, to do in his own proper person.

Illustrations.

1. A foreign corporation by a contract submits to the jurisdiction of the English Courts. It may appoint a person as its agent to accept service of the writ on its behalf, and service on such agent is valid (d). So, a person domiciled or ordinarily resident out of the jurisdiction may appoint an agent to accept service of a writ on his behalf within the jurisdiction, and such service is valid service within the jurisdiction on the principal (e).

2. A bill of sale may be executed by an attorney on behalf of the grantor, and the grantee of the bill of sale is not necessarily incapable of acting as such attorney (f):

3. An agent may be appointed to execute a deed of arrangement (g).

(a) *Rustomjee v. R.* (1876), 2 Q. B. D. 69; 46 L. J. Q. B. 238, C. A.; *Civilian War Claimants' Association v. R.*, [1932] A. C. 14; 101 L. J. K. B. 105; *German Property Administrator v. Knoop*, [1933] 1 Ch. 439; 102 L. J. Ch. 156.

(b) A person cannot, by delegating to an agent or contractor the performance of a duty imposed upon him, escape from liability for the non-performance or improper performance of that duty. See cases cited *ante*, p. 2, note (a); *Hardaker v. Idle District Council*, [1896] 1 Q. B. 335; 65 L. J. Q. B. 363, C. A.; *Hill v. Tottenham U. C.* (1899), 79 L. T. 495; *Penny v. Wimbledon U. C.*, [1899] 2 Q. B. 722; 68 L. J. Q. B. 704, C. A.; *The Snark*, [1905] P. 105; 69 L. J. P. 41, C. A.; *The Bearn*, [1906] P. 48; 75 L. J. P. C. 9, C. A.; *Robinson v. Beaconsfield R. C.*, [1911] 2 Ch. 188; 80 L. J. Ch. 647, C. A. The performance of a duty which is merely ministerial, and does not involve discretion or skill, may, however, be delegated: *London County Council v. Hobbis* (1897), 75 L. T. 688. As to the delegation by a sheriff of his duties, see *Gregory v. Cotterell* (1855), 5 E. & B. 571.

(c) Illustration 6. As to the employment of agents by trustees, see Trustee Act, 1925 (15 Geo. 5, c. 19), ss. 23, 25. And see *Speight v. Gaunt* (1883), 53 L. J. Ch. 419; 9 A. C. 81; *Fry v. Tapson* (1884), 54 L. J. Ch. 224; 18 Ch. D. 268; *Bath v. Standard Land Co.*, [1911] 1 Ch. 618; 80 L. J. Ch. 426, C. A.; *Re Munton*, [1927] 1 Ch. 262; 96 L. J. Ch. 151.

(d) R. S. C., Ord. 11, r. 2a; *Tharsis Copper Co. v. La Société des Metaux* (1889), 58 L. J. Q. B. 435. As to foreign corporations carrying on business within the jurisdiction by means of an agent, see *La Bourgogne*, [1899] A. C. 431; 68 L. J. P. 104, H. L.; *Saccharin Corp'n. v. Chemische Fabrik von Heyden Actiengesellschaft*, [1911] 2 K. B. 516; 80 L. J. K. B. 1117, C. A.; *Thames and Mersey Marine Ins. Co. v. Societa, etc., del Lloyd Austriaco* (1914), 111 L. T. 97, C. A.

(e) *Montgomery v. Liebenthal*, [1898] 1 Q. B. 487; 67 L. J. Q. B. 313, C. A.; *Reverendary Interest Society v. Locking*, [1928] W. N. 227; and see R. S. C., Ord. 11, r. 2a.

(f) *Furnivall v. Hudson*, [1893] 1 Ch. 335; 62 L. J. Ch. 178.

(g) *Re Wilson*, [1916] 1 K. B. 382; 85 L. J. K. B. 329.

4. A written offer to purchase land is made to an agent in his own name, the name of the principal not appearing in the offer. The agent accepts the offer on behalf of his principal, naming him. The offer and acceptance show sufficiently who are the contracting parties to satisfy the Law of Property Act, 1925, s. 40 (h). It is otherwise if the principal be not named (i).

5. A partner may exercise his right to inspect and take copies from partnership books under section 24 (9) of the Partnership Act, 1890, by means of an agent to whom no personal objection can be made by the co-partners (k).

6. Where the rules of a trade union provide that its books shall be open to the inspection of all the members, the members may inspect the books by means of an accountant, the accountant undertaking to use the information obtained only to inform his clients the results of the inspection (l). Similarly a "person interested" under the Public Health Act, 1875, s. 247 (4), is entitled to inspect the books and accounts of a local authority by means of an accountant (m).

7. An information for an offence against the Metalliferous Mines Regulation Act, 1872, may be laid by an agent duly authorised in that behalf by an inspector under the Act (n); and a "sampling officer" under the Food and Drugs (Adulteration) Act, 1928, s. 16, may procure a sample by means of an agent, and lay an information in his own name in respect of an analysis of the sample so procured (o).

8. *Discretionary powers.*—A person who is given a power or authority of a discretionary nature must, as a general rule, exercise it in person. Thus, where the consent of a particular person was required for the execution of a power of appointment, it was held that he had no power to appoint an agent to consent thereto in his place, the authority being one involving personal discretion (p). So, the donee of a special power of appointment cannot delegate the power to an agent (q). The rules as to delegation of authority by agents are founded upon the same principle (r).

9. *Statutes requiring personal performance.*—Lord Tenterden's Act (s) requires that representations as to credit, in order to be actionable, must be made in writing, signed by the party to be charged. Such a document must be signed by the party himself, and the signature of an agent is insufficient, even if expressly ratified by the principal (t). A proposal for a composition

(h) 15 Geo. 5, c. 20; *Filby v. Hounsell*, [1896] 2 Ch. 737; 65 L. J. Ch. 852.

(i) *Lovesy v. Palmer*, [1916] 2 Ch. 233; 85 L. J. Ch. 481; *Smith-Bird v. Blower*, [1939] 2 A. E. R. 406.

(k) 53 & 54 Vict. c. 39; *Bevan v. Webb*, [1901] 2 Ch. 59; 70 L. J. Ch. 536, C. A.

(l) *Norey v. Keep*, [1909] 1 Ch. 561; 78 L. J. Ch. 334.

(m) *R. v. Bedwellty U. D. C.*, [1934] 1 K. B. 333; 103 L. J. K. B. 152. S. 247 (4) of the Public Health Act, 1875 (38 & 39 Vict. c. 55), has been replaced by s. 224 of the Local Government Act, 1933 (23 & 24 Geo. 5, c. 51).

(n) 35 & 36 Vict. c. 37, see s. 35; *Foster v. Fyfe*, [1896] 2 Q. B. 104; 64 L. J. M. C. 184.

(o) 18 & 19 Geo. 5, c. 31; *Tyler v. Dairy Supply Co.* (1908), 98 L. T. 867; *Garforth v. Essam* (1892), 56 J. P. 521; 8 T. L. R. 243.

(p) *Hawkins v. Kemp* (1803), 3 East, 410.

(q) *Ingram v. Ingram* (1740), 2 Atk. 88.

(r) See Article 42.

(s) Statute of Frauds Amendment Act, 1828 (9 Geo. 4, c. 14), s. 6.

(t) *Williams v. Mason* (1873), 28 L. T. 232; *Swift v. Jewesbury* (1874), 43 L. J. Q. B. 56; L. R. 9 Q. B. 301, Ex. Ch.; *Hirst v. West Riding Banking Co.*, [1901] 2 K. B. 590; 70 L. J. K. B. 828.

under the Bankruptcy Act, 1914, must be signed by the debtor (x). And an agent cannot sign a consent for a party to be added under R. S. C., Ord. 16, r. 11 (y). But, as a general rule, where the signature of a person is required by statute, it is sufficient if the name of that person is signed by a duly authorised agent, unless a contrary intention plainly appear (z). Thus, an agent may be appointed to subscribe the name of the principal to the memorandum of association of a joint stock company (a), or to the instrument of dissolution of a building society (b), and such a signature is a sufficient compliance with the Companies Act, 1929 (c), s. 3, or the Building Societies Act, 1874 (d), s. 32, respectively.

Article 6.

CO-PRINCIPALS.

Where an agent is appointed by two or more persons jointly, he is not bound to account to them separately (e); and is not discharged unless he account to them all (f), except where the principals are partners (g). But an agent who has been severally appointed by one person cannot refuse to account separately to him on the ground that others are jointly interested in the money in the agent's hands (h).

Article 7.

CO-AGENTS.

Where an authority is given to two or more persons, it is presumed to be given to them jointly, unless a contrary intention appear from the nature or terms of the authority, or from the circumstances of the particular case (i).

All the co-agents must concur in the execution of a joint authority, in order to bind the principal, in the absence of a provision that a certain number of them shall form a quorum (j); provided that, where the authority is of a public nature, and the

(x) 4 & 5 Geo. 5, c. 59, s. 16; *Re Blücher*, [1931] 2 Ch. 70; 100 L. J. Ch. 292, C. A.

(y) *Fricker v. Van Grutten*, [1896] 2 Ch. 649; 65 L. J. Ch. 823, C. A.

(z) *France v. Dutton*, [1891] 2 Q. B. 208; 60 L. J. Q. B. 498. And see *Re African Farms*, [1906] 1 Ch. 640; 75 L. J. Ch. 378, where, on a petition for the winding up of a company, the Court accepted an affidavit of the attorney of the petitioner in verification of the petition.

(a) *Re Whitley Partners, Ltd.* (1886), 55 L. J. Ch. 540; 32 Ch. D. 337, C. A.

(b) *Dennison v. Jeffs*, [1896] 1 Ch. 611; 65 L. J. Ch. 435.

(c) 19 & 20 Geo. 5, c. 23.

(d) *Hatsall v. Griffith* (1834), 2 Cr. & M. 679; 3 L. J. Ex. 191; *Brown v. Bradford* (1842), 2 M. & Rob. 413; *Heath v. Chilton* (1844), 12 M. & W. 632; 13 L. J. Ex. 225.

(f) *Lee v. Sankey* (1872), L. R. 15 Eq. 204; *Innes v. Stephenson* (1831), 1 M. & Rob. 145; *Jones v. Cuthbertson* (1873), L. R. 8 Q. B. 504; 42 L. J. Q. B. 221, Ex. Ch.; but see *Husband v. Davis* (1851), 10 C. B. 645; 20 L. J. C. P. 118.

(g) *Innes v. Stephenson*, *supra*; see Article 8.

(h) *Roberts v. Ogilby* (1821), 9 Price, 269; *Suart v. Welch* (1839), 4 M. & C. 305; and see Article 49.

(i) Illustrations 1 to 4: *Boyd v. Durand* (1809), 2 Taunt. 161.

of executing it, the act of the majority is, for this purpose, deemed to be the act of the whole body (*k*).

Where an authority is given to two or more persons severally, or jointly and severally, any one or more of them may execute it without the concurrence of the other or others (*l*).

Illustrations.

1. A provisional committee appointed eight specified persons to act as a managing committee on their behalf. Six of such persons gave an order within the scope of the authority conferred. Held, that the provisional committee were not bound by the order (*m*).

2. Two persons filled the office of clerk to the trustees of a road. Held, that they must contract jointly in order to bind the trustees (*n*).

3. The regulations of a company provide that the business shall be managed by directors, a certain number of whom shall constitute a board. The company is not bound by the acts of the directors, unless consented to by them all, or by a majority present at a duly convened and constituted board meeting (*o*).

4. The directors of a company, being duly authorised in that behalf, resolved that all their powers, except their power to make calls, should be delegated to three of their number as a committee. Held, that at a meeting of the committee for the purpose of exercising such powers, all the members of the committee must be present (*p*).

5. A power of attorney was given to fifteen persons, "jointly or severally to execute such policies as they or any of them should jointly or severally think proper." Held, that a policy executed by four of such persons was binding on the principal (*q*).

Article 8.

AGENCY OF PARTNERS.

Every partner is an agent of the firm and of his other partners, for the purpose of the business of the partnership; and the acts of every partner, who does any act for carrying on in the usual way business of a kind carried on by the firm of which he is a member, bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the

(*k*) *Grindley v. Barker* (1798), 1 B. & P. 229; *Cortis v. Kent Waterworks Co.* (1827), 7 B. & C. 314.

(*l*) Illustration 5. The law laid down in Co. Litt. 181 (b) as to joint and several authorities given to three or more persons appears to be obsolete.

(*m*) *Brown v. Andrew* (1849), 18 L. J. Q. B. 153.

(*n*) *Bell v. Nixon* (1832), 9 Bing. 393.

(*o*) *Ridley v. Plymouth Grinding Co.* (1848), 2 Ex. 711; *Kirk v. Bell* (1850), 16 Q. B. 290; *D'Arcy v. Tamar Ry.* (1866), L. R. 2 Ex. 158; *Ex p. Smith* (1888), 39 Ch. D. 546; *Re Haycraft, etc., Co.*, [1900] 2 Ch. 230.

(*p*) *Re Liverpool Household Stores* (1890), 59 L. J. Ch. 616.

(*q*) *Guthrie v. Armstrong* (1822), 5 B. & A. 628.

particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner (r).

Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he be in fact specially authorised by the other partners, but this does not affect any personal liability incurred by an individual partner (s).

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of his firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act (t).

The liability of partners *ex contractu* is joint, but the estate of a deceased partner is severally liable for debts and obligations unsatisfied, subject to prior payment of his separate debts (u). Liability *ex delicto* is joint and several (x).

An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of business, is evidence against the firm (y); and notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner (z).

Trading Partnerships.

In the case of trading partnerships (a) a partner has implied authority, for the purpose of the partnership business, to pledge or sell the partnership property, buy goods, contract and pay debts, and draw, make, sign, indorse, accept, transfer, negotiate and procure to be discounted, promissory notes,

(r) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 5. If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement: s. 8. As to liability by holding out, see ss. 14, 36; Article 10. As to liability of incoming and outgoing partners, see s. 17. As to execution of deeds, see Article 24.

(s) *Ibid.*, s. 7.

(t) *Ibid.*, s. 10. Where one partner, acting within the scope of his apparent authority, receives the money or property of a third person and misapplies it; and where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm; the firm is liable to make good the loss: s. 11. If a partner, being a trustee, improperly employs trust property in the business or on account of the partnership, no other partner is liable for the trust property to the persons beneficially interested therein, unless he has notice of the breach of trust; but this does not prevent trust money from being followed and recovered from the firm if still in its possession or control: s. 13.

(u) See *ibid.*, s. 9.

(z) See *ibid.*, s. 12.

(y) *Ibid.*, s. 15.

(z) *Ibid.*, s. 16.

(a) Firms of solicitors (*Hedley v. Bainbridge* (1842), 2 Q. B. 316; 11 L. J. Q. B. 293), brokers (*Fates v. Dalton* (1858), 28 L. J. Ex. 69), auctioneers (*Wheatley v. Smithers*, [1906] 2 K. B. 321; 75 L. J. K. B. 627; on appeal ([1907] 2 K. B. 684) the C. A. expressed no opinion upon the point) or cinematograph theatre proprietors (*Higgins v. Beauchamp*, [1914] 2 K. B. 1192; 84 L. J. K. B. 631) are not within the category.

bills of exchange, cheques and other negotiable paper (*b*); but not to issue acceptances in blank (*c*). He may also make an equitable mortgage of partnership property (*d*).

Article 9.

CONSTITUTION OF THE RELATION OF AGENCY.

The relation of agency exists, and can only exist, by virtue of the express or implied assent of both principal and agent (*e*), except in certain cases of necessity, in which the relation is imposed by operation of law (*f*).

The assent of the principal is implied whenever another person occupies such a position that, according to ordinary usage, he would be understood to have the principal's authority to act on his behalf (*g*).

The assent of the agent is implied whenever he acts or purports to act on behalf of another person; and after having so acted or purported to act he is not permitted, in an action by such person, to deny that the agency in fact existed, or that he acted on such person's behalf (*h*).

The relationship of principal and agent may be constituted—

- (a) by express appointment by the principal (*i*), or by a person duly authorised by the principal to make such appointment (*k*);
- (b) by implication of law from the conduct or situation of the parties (*l*), or from the necessity of the case (*m*); or
- (c) by subsequent ratification by the principal of acts done on his behalf (*n*).

Where a person assumes to act on behalf of another, the assent of the person on whose behalf the act is done will not be implied from his mere silence or acquiescence, unless the situation of the parties is such as to raise a presumption that the act is done by his authority (*o*).

Illustrations.

1. A receiver appointed by a mortgagee in pursuance of the implied power conferred by the Law of Property Act, 1925, s. 109, is, in the performance

(*b*) *Bank of Australia v. Breillat* (1847), 6 Moo. P. C. 152, 194; 12 Jur. 189; *Butchart v. Dresser* (1853), 4 De G. M. & G. 542; 10 Hare, 453.

(*c*) *Hogarth v. Latham* (1878), 3 Q. B. D. 643; 47 L. J. Q. B. 339. This would not affect a holder in due course.

(*d*) *Re Bourne*, [1906] 2 Ch. 427; 75 L. J. Ch. 779, C. A.; *Re Clough* (1885), 55 L. J. Ch. 77; 31 Ch. D. 324.

(*e*) *Pole v. Leask* (1862), 33 L. J. Ch. 155; *Markwick v. Hardingham* (1880), 15 Ch. D. 339, 349, C. A.; *Love v. Mack* (1905), 93 L. T. 352, C. A. (*f*) Illustration 13.

(*g*) See the judgment in *Pole v. Leask* (1862), 33 L. J. Ch. 155, H. L. Illustrations 1 to 10; Article 83, Illustration 10.

(*h*) *Roberts v. Ogilby* (1821), 9 Price, 269; *Moore v. Peachey* (1891), 7 T. L. R. 748.

(*i*) See Article 23.

(*k*) Illustrations 1 and 2; Article 43.

(*l*) Illustrations 3 to 10. See also Articles 12 *et seq.* as to the implied agency of married women, etc., and pp. to as to implied agency of shipmasters.

(*m*) Illustration 13. (*n*) See Articles 26 *et seq.* (*o*) Illustrations 11 and 12.

of his duties as receiver, an agent of the mortgagor, and if appointed after the death of the mortgagor, is an agent of his legal personal representatives to the extent of the assets (p). But, if the receiver refuse to account to the mortgagee for moneys coming to his hands, the mortgagee can bring an action against him for an account (q).

2. By a trust deed securing debentures, the property of a company was transferred to trustees upon trust to permit the company to carry on the business until the happening of certain events upon which the trustees were empowered to appoint a receiver, and it was provided that any receiver so appointed should be the agent of the company, which alone should be liable for his acts and defaults. It was held that a receiver so appointed, who entered into possession and carried on the business of the company, was not an agent of the trustees, and that they were not liable for the price of goods supplied for the purposes of the business (r). But where power was given by debentures to the holders to appoint a receiver to take possession of the property charged and carry on the business of the company, and to sell the property charged and make any arrangements or compromise in the interests of the debenture holders, and it was not provided that the receiver should be an agent of the company, it was held that a receiver appointed in pursuance of the power was an agent of the debenture holders and not of the company (s). So, a receiver and manager of the business of a company appointed by the Court at the instance of debenture holders is not an agent of the company (t).

3. A debtor executes a deed whereby A and B are appointed inspectors, with power to control him in carrying on a business, and to receive moneys and pay current expenses, etc., but not to take the management of the business out of his hands. The debtor is not an agent of A and B to carry on the business, but a principal carrying on his own business subject to their inspection and control (u).

4. A debtor, by deed, assigns his business and effects to A and B as trustees to continue the business in his name, for the benefit of his creditors, and, in accordance with the provisions of the deed, the debtor is employed by A and B to carry on the business. The debtor is an agent of A and B for the purpose of carrying on the business, and they are liable on contracts made

(p) 15 Geo. 5, c. 20; *Re Hale, Lilley v. Foad*, [1899] 2 Ch. 107; 68 L. J. Ch. 517, C. A.

(q) *Leicester Permanent Building Society v. Butt*, [1943] Ch. 308; 112 L. J. Ch. 289.

(r) *Gosling v. Gaskell*, [1897] A. C. 575; 66 L. J. Q. B. 848, H. L.

(s) *Re Vimbos*, [1900] 1 Ch. 470; 69 L. J. Ch. 209; *Deyes v. Wood*, [1911] 1 K. B. 806; 80 L. J. K. B. 553, C. A.

(t) *Burt v. Bull*, [1895] 1 Q. B. 276; 64 L. J. Q. B. 232, C. A.; and see *Boehm v. Goodall* (1910), 27 T. L. R. 106. A person authorised under the Lunacy Act, 1890 (53 & 54 Vict. c. 5), ss. 116 and 120, to carry on the business of a lunatic not so found, is in the position of an agent of the lunatic for that purpose: *Plumpton v. Burkinshaw*, [1908] 2 K. B. 572; 77 L. J. K. B. 961, C. A.

(u) *Redpath v. Wigg* (1866), 35 L. J. Ex. 311; L. R. 1 Ex. 335, Ex. Ch.; *Easterbrook v. Barker* (1870), 40 L. J. C. P. 17; L. R. 6 C. P. 1; *Hobson v. Jones* (1870), 39 L. J. Ch. 245; L. R. 9 Eq. 456; *Marconi's Wireless Telegraph Co. v. Newman*, [1930] 2 K. B. 292; 99 L. J. K. B. 687.

by him in the ordinary course thereof in his own name (*x*). The debtor is not, nor are A and B, the agent of the creditors in carrying on the business (*y*).

5. A buys property at a sale by auction. The auctioneer is an implied agent of A for the purpose of signing the contract of sale on his behalf, so as to satisfy the requirements of the Law of Property Act, 1925 (*z*), s. 40, or of the Sale of Goods Act, 1893 (*a*), s. 4, it being understood that the auctioneer has authority, in the ordinary course of business, to sign the contract on behalf of the highest bidder (*b*). Subsequently to the sale, B buys certain unsold lots by private contract with the auctioneer. The auctioneer has no implied authority to sign the contract on B's behalf (*c*). The implied authority to sign for the highest bidder can only be exercised at the time of the sale, i.e., while the bidder is in the auction room, or so long afterwards as the signature can reasonably be held to form part of the contract (*d*). And an authority to sign separate contracts for several lots is not an authority to sign one contract for all the lots (*e*).

6. A buys property at a sale by auction, and, at the request of the auctioneer's clerk, who is acting under the directions of the auctioneer, gives his name and address as purchaser, and stands by while the clerk fills in the name and address in a memorandum of the sale. The memorandum is signed by a duly authorised agent of A within the meaning of the Law of Property Act, 1925 (*z*), s. 40, the conduct of A being such as to show that he assented to the clerk's signing his name on his behalf (*f*). The implied authority of the auctioneer to sign on behalf of a purchaser does not, however, extend to the auctioneer's clerk, and a purchaser is not bound by the signature of the clerk, unless he indicates, by word or sign, that he assents to the clerk's signing for him (*g*).

7. A bought goods at a sale by auction, the vendor having previously agreed with him that the price of any goods he might buy should be set off against a debt. Held, that the auctioneer, though not aware of the previous agreement with the vendor, had no authority to sign on A's behalf a contract subject to a condition providing for payment in cash (*h*).

8. A mortgagor in possession is an implied agent of the mortgagee to distrain for rent due under a lease granted prior to the mortgage (*i*). But a pledgee of an insurance policy has no implied authority, as such, to give, on behalf of the pledgor, a notice of abandonment to the underwriters (*k*).

(*x*) *Furze v. Sharwood* (1841), 2 Q. B. 388. Comp. *Nicholls v. Knapman* (1910), 102 L. T. 306, C. A.

(*y*) *Cox v. Hickman* (1861), 30 L. J. C. P. 125; 9 H. L. Cas. 268, H. L.

(*z*) 15 Geo. 5, c. 20.

(*a*) 56 & 57 Vict. c. 71.

(*b*) *Emmerson v. Heelis* (1809), 2 Taunt. 38; *White v. Proctor* (1811), 4 Taunt. 209. But the auctioneer has no authority to sign a contract bearing a wrong date: *Van Praagh v. Everidge*, [1903] 1 Ch. 434; 72 L. J. Ch. 280, C. A.

(*c*) *Mews v. Carr* (1856), 1 H. & N. 484.

(*d*) *Bell v. Balls*, [1897] 1 Ch. 663; 66 L. J. Ch. 397; *Chaney v. Maclow*, [1920] 1 Ch. 461; 98 L. J. Ch. 345, C. A.

(*e*) *Smith v. MacGowan*, [1938] 3 A. E. R. 447.

(*f*) *Sims v. Landray*, [1894] 2 Ch. 318; 63 L. J. Ch. 535; *Bird v. Boulter* (1833), 1 N. & M. 313; 38 R. R. 285.

(*g*) *Bell v. Balls* (*supra*).

(*h*) *Bartlett v. Purnell* (1836), 5 L. J. K. B. 169; 4 A. & E. 792.

(*i*) *Trent v. Hunt* (1853), 9 Ex. 14; 22 L. J. Ex. 318; *Snell v. Finch* (1863), 32 L. J.

C. P. 117; 13 C. B. (N.S.) 651.

(*k*) *Jardine v. Leathley* (1863), 32 L. J. Q. B. 132; 3 B. & S. 700.

9. Property is sold under a decree. The solicitor having the management of the sale is, in the conduct thereof, deemed to be the agent of all the parties to the suit, as between them and the purchaser (l).

10. The promoters of a company are not, as such, implied agents to pledge the credit, or receive money on behalf, of each other, in connection with the promotion of the company. Nor are the officers of a proposed company, as such, implied agents of the promoters (m).

11. A called at B's office and verbally agreed to be responsible for the price of certain goods to be supplied by B to a third person. B's clerk, in A's presence, made and signed a memorandum of the agreement. Held, that the clerk had no implied authority to sign as A's agent, and that there was not a sufficient memorandum in writing of the agreement to satisfy section 4 of the Statute of Frauds (n).

12. A's traveller sold goods to B, and in B's presence wrote out two memoranda of the sale; put B's name upon them; handed one to B; and retained the other. Held, that he had no implied authority to sign a memorandum of the contract as B's agent (o). Otherwise, if B had by his conduct shown an intention to constitute the traveller his agent for the purpose of making a record of the contract on his behalf (p).

13. *Agency of Necessity*.—An authority of necessity is conferred by law in certain cases where an agent, in the course of his employment, is faced with an emergency in which the property or interests of his principal are in imminent jeopardy and it becomes necessary, in order to preserve the property or interests of the principal, to act before the principal's instructions can be obtained. In the case of a shipmaster an authority arises from the emergencies of the voyage (q). In the case of a carrier it arises when goods are in his possession and it becomes necessary to provide for their safety or preservation (r), or, where the goods are perishable, to sell them in the best interests of the owner (s). It has been held that, where, under a contract of sale to a buyer in a foreign country, goods were exported, which were not in accordance with the contract, and the buyer could not, acting reasonably or consistently with the interests of the seller, return them, the buyer might act as agent for the seller in selling the goods (t); and that sellers of goods to a buyer abroad, to whom, owing to war conditions, they could not deliver, and with whom they were unable to communicate, might re-sell as the original buyer's agents

(l) *Dalby v. Pullen* (1830), 1 Russ. & M. 296.

(m) See Article 10, Illustration 3; *Burnside v. Dayrell* (1849), 3 Ex. 224; 19 L. J. Ex. 46.

(n) 29 Car. 2, c. 3; *Dixon v. Broomfield* (1814), 2 Chit. 205.

(o) *Murphy v. Boase* (1875), 44 L. J. Ex. 40; L. R. 10 Ex. 126; *Graham v. Musson* (1839), 8 L. J. C. P. 324; 7 Scott, 769; *Graham v. Fretwell* (1841), 3 M. & G. 368.

(p) *Durrell v. Evans* (1862), 31 L. J. Ex. 337; 1 H. & C. 174, Ex. Ch.

(q) See pp. 64—68.

(r) *G. N. Ry. v. Swaffield* (1874), 43 L. J. Ex. 69; L. R. 9 Ex. 132.

(s) *Sims v. Midland Ry.*, [1913] 1 K. B. 103; 82 L. J. K. B. 67. A real necessity must exist for the sale and it must be practically (commercially) impossible to get the owner's instructions in time as to what should be done: *ibid.*; *Springer v. G. W. Ry.*, [1921] 1 K. B. 257; 89 L. J. K. B. 1010.

(t) *Kemp v. Pryor* (1812), 7 Ves. 237.

of necessity (u); but the latter decision has been strongly criticised and it seems doubtful whether an agency of necessity would arise in either case (x).

It has been held that no lien arises in favour of a stranger who succours a stray animal (y) or conveys timber found on the bank of a river to a place of safety (z) and probably no money claim arises in either case (y) (z). A wife deserted by her husband may pledge his credit as agent of necessity (a). An authority of necessity is said to arise in the case of acceptance of a bill of exchange for honour (b).

Article 10.

AGENCY BY ESTOPPEL: HOLDING OUT.

Where any person, by words or conduct, represents or permits it to be represented (c) that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to any one dealing with him as an agent on the faith of such representation (d), to the same extent as if such other person had the authority which he was so represented to have (e).

Everyone who, by words spoken or written, or by conduct, represents himself, or who knowingly suffers himself to be represented, as a partner (f) in a particular firm, is liable as a partner to anyone who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by, or with the knowledge of, the apparent partner making the representation or suffering it to be made. Provided that where after a partner's death the partnership business is continued in the old firm's name, the continued use of that name or of the deceased partner's name as part thereof does not of itself make his executors, or administrators, estate, or effects, liable for any partnership debts contracted after this death (g).

(u) *Prager v. Blatspiel*, [1924] 1 K. B. 566; 93 L. J. K. B. 410.

(x) See *Jebara v. Ottoman Bank*, [1927] 2 K. B. 254; 96 L. J. K. B. 451, *per* Scrutton, L.J.; and see *Gwilliam v. Twist*, [1895] 2 Q. B. 84; 64 L. J. Q. B. 74; *Hawtayne v. Bourne* (1841), 7 M. & W. 595.

(y) *Binstead v. Buck* (1776), 2 Wm. Bl. 1117.

(z) *Nicholson v. Chapman* (1793), 2 Hy. Bl. 254.

(a) See Article 17.

(b) See Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 65; *Gwilliam v. Twist*, *supra*.

(c) Where a third party has written notice, from the principal, of the extent of the agent's authority, it requires a strong case to establish ostensible authority beyond the actual authority so notified: *Australian Bank of Commerce v. Parel*, [1926] A. C. 737; 95 L. J. P. C. 585, P. C.

(d) See Illustration 17.

(e) See Illustrations. *Brazier v. Camp* (1894), 63 L. J. Q. B. 257, C. A.; *King v. Smith*, [1900] 2 Ch. 425; 69 L. J. Ch. 598; *Union Credit Bank v. Mersey Docks, etc., Board*, [1899] 2 Q. B. 205; 68 L. J. Q. B. 842; *Little v. Spreading*, [1910] 2 K. B. 658; 79 L. J. K. B. 1119. This is an instance of the principle of estoppel *in pais*: see *Pole v. Leask* (1862), 33 L. J. Ch. 155. As to holding out by corporations, see Article 25.

(f) As to the agency of partners, see Article 8.

(g) Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 14. Where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm, until he has notice of the change: s. 36. Advertisement in the London Gazette is notice to persons who had not dealings with the firm before the change: *ibid*.

Neither the committee of management nor servants of a club are, as such, deemed to be held out by the members of the club as having authority to pledge the personal credit of the members (*h*). But the members of a committee may be liable for the acts of a servant whom they have appointed (*i*).

Illustrations.

1. The owner of certain goods permits A, who in the ordinary course of his business is accustomed to sell that class of goods, to have possession of the goods or of the documents of title thereto. A sells the goods to a person who buys them in the belief that he has authority to sell. The owner is bound by the sale, independently of the Factors Acts, though he did not, in fact, authorise A to sell the goods (*k*).

2. A and B permitted their names to appear on a programme as stewards of a fête, C's name appearing thereon as general manager. A and B took an active part in the conduct of the fête. Held, that they were liable on orders given by C for tents, etc. (*l*).

3. At a meeting of the provisional directors of a proposed company it was resolved that the company should be advertised, and the secretary was directed to take the necessary steps for that purpose. The secretary employed an advertising agent and upon being asked on what authority he was acting, showed the agent the prospectus and resolution. Held, that the jury were justified in finding the directors who were parties to the resolution liable for the expenses of the advertising agent, on the ground that they had held out the secretary as having authority to pledge their credit therefor, though they had allowed their names to appear as provisional directors on the faith of a promise by the secretary to find all the preliminary expenses (*m*). Where a promoter of a company has taken an active part in the promotion, it is a question of fact whether he thereby has held himself out as having authorised his credit to be pledged for expenses connected therewith, and if so, whether the expenses were incurred on the faith of such holding out (*n*). But the mere fact that a person is a promoter is not, of itself, evidence of his having authorised, or held himself out as having authorised, his credit to be pledged (*o*).

(*h*) *Fleming v. Hector* (1836), 6 L. J. Ex. 43; 2 M. & W. 172. Illustration 15. *Wise v. Perpetual Trustee Co.*, [1903] A. C. 139; 72 L. J. P. C. 31, P. C. Comp. *Cockerell v. Aucompte* (1857), 26 L. J. C. P. 194; 2 C. B. (N.S.) 440; *Luckombe v. Ashton* (1862), 2 F. & F. 705.

(*i*) Illustration 16.

(*k*) *Pickering v. Busk* (1812), 15 East, 38; *Dyer v. Pearson* (1824), 4 D. & R. 648; *Henderson v. Williams*, [1895] 1 Q. B. 521; 64 L. J. Q. B. 308, C. A.

(*l*) *Pilot v. Craze* (1888), 52 J. P. 311.

(*m*) *Maddick v. Marshall* (1864), 17 C. B. (N.S.) 829, Ex. Ch.; *Riley v. Packington* (1867), L. R. 2 C. P. 536; 36 L. J. C. P. 204; *Pearson's Exors.' Case* (1852), 3 De G. M. & G. 241.

(*n*) *Lake v. Argyll* (1844), 6 Q. B. 477; 14 L. J. Q. B. 73; *Wood v. Argyll* (1844), 13 L. J. C. P. 96; 6 M. & G. 928; *Bailey v. Macauley* (1849), 13 Q. B. 815; 19 L. J. Q. B. 73; *Williams v. Pigott* (1848), 2 Ex. 201; 17 L. J. Ex. 196; *Bright v. Hutton* (1852), 3 H. L. C. 341; *Higgins v. Hopkins* (1848), 3 Ex. 163; 18 L. J. Ex. 113.

(*o*) *Norris v. Cottle* (1850), 2 H. L. C. 647; *Bright v. Hutton*, *supra*; *Hutton v. Thompson* (1851), 3 H. L. C. 161; *Burbidge v. Morris* (1865), 34 L. J. Ex. 131; 3 H. & C. 664; *Wylde v. Hopkins* (1846), 15 M. & W. 517; 71 R. R. 751; *Barker v. Stead* (1847), 3 C. B. 946; *Bailey v. Macauley*, *supra*; *Williams v. Pigott*, *supra*.

4. A charterparty provides that the master, who is appointed by the owners, shall sign bills of lading as the agent of the charterers only. The owners are liable on a bill of lading signed by the master, to a person who ships goods without notice of the charterparty (*p*). So, the owners are liable in such a case for necessities supplied on the master's orders by persons having no notice of the charterparty (*q*).

5. A had for some years managed a shop belonging to B and ordered goods in B's name from C, and B had duly paid for them. A absconded, called on C and bought goods in B's name, and took them away. Held, that B was liable for the price of the goods (*r*).

6. A coachman in livery entered into a contract for the hire of horses, the person from whom he hired them giving credit to the master. The coachman had, in fact, agreed with the master to pay for the hire of the horses, but the person from whom they were hired had no notice of the agreement. Held, that the master was liable on the contract (*s*).

7. A wife gave orders for furniture to be supplied and work to be done at the house where she resided with her husband, the husband being present giving directions as to the work, etc. Held, that the husband was liable on the orders, although he had expressly forbidden his wife to pledge his credit, and it had been agreed between them that she should pay for the furniture and work, the plaintiff having had no notice of such prohibition or agreement (*t*). So, where a wife ordered goods in her husband's name, to be sent to the house of a third person, and the husband paid for the goods, it was held that there was evidence upon which a jury might find that she had authority to pledge his credit on a subsequent occasion for goods to be sent to the same house (*u*).

8. A occasionally employed B to purchase goods from C, and duly recognised such purchases. Subsequently, B purchased goods from C for his own use, C believing him to be buying them on behalf of A, and giving credit to A. Held, that it was a question of fact whether A had, by his conduct, held out B as his agent to purchase the goods (*x*).

9. A, a stockbroker, employed B, a clerk, to whom he allowed a commission on orders obtained by him and accepted by A. B was not authorised to accept orders on A's behalf. On three occasions C gave orders to B, which were passed on to A, and executed by him, A sending contract notes to C.

(*p*) *Manchester Trust v. Furness*, [1895] 2 Q. B. 539; 64 L. J. Q. B. 766, C. A.; *Sandeman v. Scurr* (1866), L. R. 2 Q. B. 86; 36 L. J. Q. B. 58. Comp. *Baumwoll Manufactur v. Furness*, [1893] A. C. 8; 62 L. J. Q. B. 201, H. L.

(*q*) *The Great Eastern* (1868), L. R. 2 Ad. 88; *Frost v. Oliver* (1853), 1 C. L. R. 1003; 22 L. J. Q. B. 353.

(*r*) *Summers v. Solomon* (1857), 26 L. J. Q. B. 301.

(*s*) *Rimell v. Sampayo* (1824), 1 C. & P. 254; *Precious v. Abel* (1795), 1 Esp. 350. Comp. *Maunder v. Conyers* (1817), 2 Stark. 281; *Wright v. Glyn*, [1902] 1 K. B. 745; 71 L. J. K. B. 497, C. A.

(*t*) *Jelley v. Hill* (1884), 1 C. & E. 239.

(*u*) *Filmer v. Lynn* (1835), 4 N. & M. 559.

(*x*) *Todd v. Robinson* (1825), 1 Ry. & M. 217; *Gilman v. Robinson* (1825), 1 Ry. & M. 226; *Trueman v. Loder* (1840), 11 A. & E. 589; *Llewellyn v. Winckworth* (1845), 14 L. J. Ex. 329; 13 M. & W. 598; *Prescott v. Flynn* (1832), 1 L. J. C. P. 145; 9 Bing. 19. Comp. *Barrett v. Ervine*, [1907] 2 Ir. R. 462, C. A.

C made payment in respect of the first two orders by cheques payable to A's order, and in respect of the third order by a cheque payable to B's order. The cheques were delivered to B, and passed on to A, who duly credited C. Subsequently, C gave orders to B, who did not transmit them to A, but made out bought notes on which he forged A's signature, and handed them to C. C gave cheques in payment to B, who misapplied them. It was held that there was no evidence that A had held out B as authorised to accept orders on his behalf, and that A was under no liability in respect of the orders subsequent to the first three (y).

10. A represented to a company that B was an applicant for a certain number of shares, and the company allotted them to B. Subsequently, B, at A's request, signed an application for the shares and sent it to A, who received the letter of allotment, and paid the allotment money. B never received any notice of the allotment, and the dividends on the shares were paid to A. Held, that B had held out A as his agent to accept the shares on his behalf, and was therefore liable as a contributory in the winding-up of the company (z).

11. A signs an underwriting agreement purporting to give B authority to apply for shares in a company in A's name and on his behalf, and hands it to an agent of the promoters, with a letter stating that the agreement was signed, and is only to hold good, on certain conditions. The agreement is delivered to B, who applies for the shares, and they are duly allotted to A, neither B nor the company having any notice of the letter or conditions. A is bound as a shareholder, though the conditions were not complied with (a).

12. A was in B's counting-house, apparently entrusted with the conduct of B's business. Held, that a payment to A on B's account operated as a payment to B, although A was not, in fact, employed by B (b).

13. A, in good faith, deals with persons acting as directors of a company, believing them to be duly authorised. The company is bound by their acts as directors, within the scope of the articles of association, though they have not, in fact, been properly appointed (c).

14. The directors of a company hold out A as the agent of the company for a particular purpose. The company is bound by A's acts, within the scope of such countenanced agency, done to the knowledge of the directors, though A is not a duly appointed agent of the company (d).

15. A member of the managing committee of a club orders wine for the club, the committee having no authority to deal on credit. The other members of the committee are not liable for the price of the wine, unless they authorised the contract (e). The only persons liable for goods supplied to a members'

(y) *Spooner v. Browning*, [1898] 1 Q. B. 528; 67 L. J. Q. B. 339, C. A.

(z) *Levita's Case* (1870), L. R. 5 Ch. 489; 39 L. J. Ch. 673.

(a) *Ex p. Harrison, re Bentley* (1893), 69 L. T. 204, C. A.

(b) *Barrett v. Deere* (1828), Moo. & M. 200; 31 R. R. 730.

(c) *Mahony v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869; *Re County Life Ass. Co.* (1870), L. R. 5 Ch. 288; 39 L. J. Ch. 471.

(d) *Wilson v. West Hartlepool Harbour, etc., Co.* (1864), 34 Beav. 187. See also Article 82, Illustrations 15 and 16.

(e) *Todd v. Emly* (1841), 7 M. & W. 427; 56 R. R. 748.

club are those by whom, or by whose authority, the goods are ordered, and the mere fact that a person is a member of the managing committee is not of itself evidence of authority to pledge his credit (f).

16. An unincorporated society had among its objects the investigating and advising upon diseases affecting poultry. Its affairs were managed by a council, who appointed A as manager and B as tester. All the members of the council either voted for, or knew and approved of, A's and B's appointments. The plaintiffs were invited, by letters and circulars, sent on the note-paper, and from the office, of the society, by A, to have a test made of their poultry. The test was made by B, and it was found that the test was negligently carried out and that the plaintiffs' poultry became infected as the result of such negligence. Held, that A had contracted for, and B had carried out, the test as agents for all the members of the council, who were liable for the damage caused by B's negligence (g).

17. A, the tenant and licensee of a public house, agreed with B and the owners of the public house that B should become tenant in place of A, but the licence was not transferred to B and A's name remained painted over the doorway. C, not knowing that A was the licensee, supplied goods at the public house to B; and afterwards discovered that A was the licensee and sued him for the price of the goods. Held, that the agreement that B should occupy a position as tenant which could only be lawfully occupied by A, did not make B the agent of A in relation to C; and that there was no estoppel in the matter between A and C, because, whatever misrepresentations had been made, they had not reached C nor caused him to act to his detriment (h).

Article 11.

CONTRACT OF AGENCY WILL NOT BE SPECIFICALLY ENFORCED.

No action is maintainable at the suit of either principal or agent to compel the specific performance of a contract of agency (i). The Court may, however, restrain by injunction the breach of a negative stipulation in such a contract (k).

(f) *Overton v. Hewett* (1887), 3 T. L. R. 246; *Steele v. Gourley* (1887), 3 T. L. R. 772, C. A.; *Wood v. Finch* (1861), 2 F. & F. 447; *Draper v. Manvers* (1892), 9 T. L. R. 73. See also *Lascelles v. Rathbun* (1919), 35 T. L. R. 347 (Commanding Officer not liable for price of goods ordered by mess secretary).

(g) *Bradley Egg Farm, Ltd. v. Clifford*, [1943] 2 A. E. R. 378, C. A.

(h) *Macfisheries, Ltd. v. Harrison* (1924), 93 L. J. K. B. 811.

(i) *White v. Boby* (1878), 37 L. T. 652, C. A.; *Mair v. Himalayan Tea Co.* (1865), 14 W. R. 165; *Brett v. E. I. & L. Shipping Co.* (1864), 10 L. T. 187; *Stocker v. Wedderburn* (1857), 3 Kay & J. 393; *Stocker v. Brocklebank* (1851), 20 L. J. Ch. 401; 3 Macn. & G. 250; *Pickering v. Ely* (1843), 2 Y. & Coll. C. C. 249; *Whitwood Co. v. Hardman*, [1891] 2 Ch. 416; 60 L. J. Ch. 428.

(k) *Dietrichsen v. Cabburn* (1846), 2 Phill. 52; *Mutual, etc. Life Ass. v. New York Ins. Co.* (1896), 75 L. T. 528, C. A.; *Kirchner v. Gruban*, [1909] 1 Ch. 413; 78 L. J. Ch. 117; *Chapman v. Westerby*, [1913] W. N. 277; *Warner v. Nelson* (1936), 155 L. T. 538.

CHAPTER III.

IMPLIED AGENCY OF MARRIED WOMEN, ETC.

By the Law Reform (Married Women and Tortfeasors) Act, 1935 (a), a married woman is, with minor exceptions, in the same position with regard to property, torts and contracts as if she were a *feme sole*. The implied authority of a wife to pledge the credit of her husband arises partly from her position as manager of his household, partly from his duty to keep her provided with necessaries suitable to her station in life, or to the style in which he permits her to live (b). It is restricted to necessaries, either for herself or for the household, and is not increased nor diminished by the insanity or lunacy of the husband (c). The existence and nature of the authority depend upon whether she lives with her husband or not; and if not, upon what is the cause of the separation, and whether it is by mutual consent or otherwise.

Article 12.

PRESUMPTION OF AUTHORITY FROM COHABITATION.

Where a husband and wife live together, the mere fact of cohabitation raises a presumption that she has authority to pledge his credit for necessaries suitable to the style in which they live (d); but there is no presumption of authority to borrow money in his name, even for the purpose of purchasing necessaries for the price of which he would have been liable if they had been bought on his credit (e).

The presumption of authority arising from cohabitation may be rebutted by proof—

- (a) that she had not in fact authority to pledge his credit (f);
- or
- (b) that she was already adequately provided with necessaries, or that her husband had made her a sufficient or agreed allowance therefor (g).

(a) 25 & 26 Geo. 5, c. 30, ss. 1—5.

(b) See *Phillipson v. Hayter* (1870), 40 L. J. C. P. 14; L. R. 6 C. P. 38. As to what are considered necessaries, see *Morgan v. Chetwynd* (1865), 4 F. & F. 451; *Jewsbury v. Newbold* (1857), 26 L. J. Ex. 247; *Hunt v. De Blaquiere* (1829), 5 Bing. 550; *Ladd v. Lynn* (1837), 2 M. & W. 265; *Goodyear v. Part* (1897), 13 T. L. R. 395.

(c) *Richardson v. Du Bois* (1869), 39 L. J. Q. B. 69; L. R. 5 Q. B. 51; *Read v. Legard* (1851), 6 Ex. 636; 20 L. J. Ex. 309.

(d) *Gray (Miss), Ltd. v. Cathcart* (1922), 38 T. L. R. 562; *Harrison v. Grady* (1865), 13 L. T. 369; *Jolly v. Rees* (1864), 33 L. J. C. P. 177; 15 C. B. (N.S.) 628; *Wauthman v. Wakefield* (1807), 1 Camp. 120; Article 116, Illustration 15.

(e) *Knox v. Bushell* (1857), 3 C. B. (N.S.) 334. See, however, *Davidson v. Wood* (1863), 32 L. J. Ch. 400; 1 De G. J. & S. 465; *Re Cook, ex p. Vernall* (1892), 10 Mor. 8.

(f) *Jolly v. Rees* (1864), 32 L. J. C. P. 177; 15 C. B. (N.S.) 628; *Debenham v. Mellon* 6 App. Cas. 24; (1880), 50 L. J. Q. B. 155, H. L.; *Gray (Miss), Ltd. v. Cathcart*, *supra*.

(g) *Seaton v. Benedict* (1828), 5 Bing. 28; *Debenham v. Mellon*, *supra*; *Reneaux v. Teakle* (1853), 8 Ex. 680; 22 L. J. Ex. 241; 91 R. R. 703; *Remington v. Broadwood* (1902), 18 T. L. R. 270, C. A.; *Morel v. Westmoreland*, [1904] A. C. 11; 73 L. J. K. B. 93, H. L.

Authority is confined to suitable necessities.—The presumption of authority arising from cohabitation is confined to necessities suitable to the style in which the husband chooses to live (*h*). If the wife order things which are not suitable to his style of living (*i*), or are of an extravagant nature (*k*) or are excessive in quantity (*k*), there is no presumption of authority, and the husband is not liable, unless it be proved that he has expressly authorised her, or held her out as having authority, to give the orders, or that he has ratified the transactions. The question whether the things are suitable necessities is a question of fact; and the burden of proof lies on the person supplying them (*h*), except in the case of such things as wearing apparel, delivered at the joint residence, which are presumed to be necessities until the contrary is shown (*l*). The mere fact that the wife has a separate income is not sufficient to rebut the presumption of authority (*m*).

Effect of forbidding her to pledge his credit.—Even in the case of suitable necessities, the presumption of authority may be rebutted by proof that she had no authority. The question whether the wife acted as her husband's agent, and with his authority, in any particular transaction, is a question of fact (*n*); and the proper question to leave to a jury is whether the things were supplied to his credit and with his authority, not merely whether they were suitable necessities (*o*). If she did not intend to pledge his credit, but contracted on her own behalf (*p*), or if, though she intended to pledge his credit, he had in fact forbidden her to do so (*q*), he is not liable, even if the person who supplied the necessities had no notice that her authority had been revoked (*q*), unless he had invested her with an appearance of authority, or had done some act leading the plaintiff to suppose that she had his authority to order them (*q*). But if, by words or conduct, he hold her out as having authority, he is liable to any person dealing with her on the faith of such holding out, notwithstanding a revocation of her authority, and though he had expressly forbidden her to pledge his credit, unless such person had actual notice of the revocation or prohibition (*r*).

Article 13.

IMPLIED AUTHORITY AS HOUSEKEEPER.

Where a wife, who is living with her husband, has the management of the household, she is his general agent in all

(*h*) *Phillipson v. Hayter* (1870), 40 L. J. C. P. 14; L. R. 6 C. P. 38.

(*i*) *Harrison v. Grady* (1865), 13 L. T. 369; *Montagu v. Benedict* (1825), 5 D. & R. 532; *Atkins v. Curwood* (1837), 7 C. & P. 756.

(*k*) *Debenham v. Mellon* (1880), 6 App. Cas. 24; 50 L. J. Q. B. 155, H. L.; *Lane v. Ironmonger* (1844), 14 L. J. Ex. 35; 13 M. & W. 368; *Freestone v. Butcher* (1840), 9 C. & P. 643.

(*l*) *Jewsbury v. Newbold* (1857), 26 L. J. Ex. 247; *Clifford v. Laton* (1827), 3 C. & P. 15.

(*m*) *Seymour v. Kingscote* (1922), 38 T. L. R. 586; *Callott v. Nash* (1923), 39 T. L. R. 292.

(*n*) *Lane v. Ironmonger* (1844), 13 M. & W. 368; 14 L. J. Ex. 35; 67 R. R. 647; *Freestone v. Butcher* (1840), 9 C. & P. 643.

(*o*) *Reid v. Teakle* (1853), 13 C. B. 627; 22 L. J. C. P. 161; *Shoolbred v. Baker* (1867), 16 L. T. 359. (*p*) *Freestone v. Butcher* (1840), 9 C. & P. 643.

(*q*) *Jolly v. Rees* (1864), 33 L. J. C. P. 177; 15 C. B. (N.S.) 628; *Debenham v. Mellon* (1880), 50 L. J. Q. B. 155; 6 App. Cas. 24, H. L.

(*r*) *Jelley v. Hill* (1884), 1 C. & E. 239; *Filmer v. Lynn* (1835), 4 N. & M. 559; *Debenham v. Mellon*, *supra*. And see Article 13.

household matters, and has implied authority to pledge his credit for all such things as are necessary in the ordinary course of such management, and are usually bought on credit (s).

Every act done by a wife within the scope of her implied authority as manager of his household binds the husband, unless she has in fact no authority to do the particular act, and the person dealing with her has, at the time of the transaction, notice that she is exceeding her actual authority (t).

Illustrations.

1. The wife of a labourer ordered provisions for the house. The husband was held liable for the price, though he had supplied his wife with sufficient money to keep house, the person supplying the goods having had no notice of that fact (u).

2. A husband, during temporary absence from home, made his wife a sufficient allowance for herself and the family. A tradesman supplied her with goods on credit, knowing that the husband had made her the allowance. Held, that the husband was not liable for the price of the goods (x).

Where a wife occupies the position of her husband's housekeeper, he is deemed to hold her out as having the usual authority of a housekeeper, and is bound by all acts within the scope of such apparent authority, unless the persons dealing with her know that her authority is expressly limited, and that she is acting in excess thereof (y). Her implied authority as housekeeper is, however, confined to domestic necessities suitable to the style in which the husband lives, and it does not extend to articles of luxury (z). The onus of proof that goods supplied on her orders are suitable necessities lies on the persons supplying them (z).

Article 14.

NO AUTHORITY, PRIMA FACIE, DURING SEPARATION.

Where a wife is separated from her husband, she has, *prima facie*, no authority to pledge his credit, and the burden lies upon any person seeking to charge the husband on her contracts of proving that the circumstances of the separation are such as to raise a presumption of authority (a).

Where a wife is judicially separated from her husband, or has obtained a protection or separation order, he is not liable in respect of any contract she may enter into, nor for any costs she may

(s) *Emmett v. Norton* (1838), 8 C. & P. 506; *Phillipson v. Hayter* (1870), 40 L. J. C. P. 14; L. R. 6 C. P. 38.

(t) Illustrations 1 and 2; *Debenham v. Mellon* (1880), 6 App. Cas. 24; 50 L. J. Q. B. 155, H. L.

(u) *Ruddock v. Marsh* (1857), 1 H. & N. 601. But see *Morel v. Westmoreland*, [1904] A. C. 11; 73 L. J. K. B. 93, H. L.

(x) *Holt v. Brien* (1821), 4 B. & A. 252.

(y) See note (s), *ante*.

(z) *Phillipson v. Hayter*, *supra*.

(a) *Edwards v. Towels* (1843), 12 L. J. C. P. 239; 6 Scott, N. R. 641; *Johnston v. Sumner* (1858), 27 L. J. Ex. 341; 3 H. & N. 261; 117 R. R. 769.

incur, while so separated (b); provided that where alimony has been decreed or ordered to be paid to the wife, and is not duly paid, the husband is liable for necessities supplied for her use (c).

Where a tradesman gives credit to a wife living apart from her husband he ought to make inquiries as to the cause of the separation; otherwise he trusts her at his peril, and is not entitled to charge the husband, unless he prove that she is justified in living apart (d). Where the husband was living abroad, and it was sought to charge him for necessities supplied to his wife in England, it was held that the plaintiff must prove that she was not sufficiently provided for, and that it was necessary for her to pledge her husband's credit (e). Even if the tradesman have no notice of the separation, he is not entitled to charge the husband unless the circumstances justify the wife in living apart, or the husband has held her out as having authority to pledge his credit (f).

A decree for judicial separation does not affect the liability of the husband under a contract made by the wife prior to the decree. Where a solicitor was retained by a wife, in pursuance of her implied authority to pledge her husband's credit, to defend divorce proceedings instituted by him, and also to conduct an action of detinue against him, it was held that the retainer was not determined by a decree for judicial separation, and that the husband was liable to the solicitor for costs incurred in pursuance of the retainer after as well as before the decree, but that he would not be liable on a retainer given by the wife subsequent to the decree (g).

Article 15.

WHERE SEPARATED BY MUTUAL CONSENT.

Where husband and wife are separated by mutual consent, and there is an agreement between them as to her maintenance, she has no implied authority to pledge his credit so long as he duly complies with the terms of the agreement, whether she is adequately provided for or not (h); but if the terms of the agreement be not duly complied with by the husband, she has implied authority to pledge his credit for necessities suitable to her station in life (i).

(b) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 21; Matrimonial Causes Act, 1864 (27 & 28 Vict. c. 44), s. 1; both repealed as to the High Court by the Judicature Act, 1925 (15 & 16 Geo. 5, c. 49), s. 226, Sch. VI; and see *ibid.*, s. 194, and note (c), *post*; Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 Vict. c. 39), s. 5 (a); Summary Jurisdiction (Separation and Maintenance) Act, 1925 (15 & 16 Geo. 5, c. 51), s. 2; *Re Wingfield*, [1904] 2 Ch. 665; 73 L. J. Ch. 797, C. A.

(c) Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 30), Sch. I.

(d) *Mainwaring v. Leslie* (1826), 2 C. & P. 507; *Reed v. Moore* (1832), 5 C. & P. 200; *Clifford v. Laton* (1827), 3 C. & P. 15.

(e) *Bird v. Jones* (1828), 3 M. & R. 121. See also *Dennys v. Sargeant* (1834), 6 C. & P. 419.

(f) *Wallis v. Biddick* (1873), 22 W. R. 76.

(g) *Re Wingfield*, *supra*.

(h) *Eastland v. Burchell* (1878), 47 L. J. Q. B. 500; 3 Q. B. D. 432; *Negus v. Forster* (1882), 46 L. T. 675, C. A.

(i) *Beale v. Arabin* (1877), 36 L. T. 249.

Where husband and wife are separated by mutual consent, and there is no agreement between them as to her maintenance, she has implied authority to pledge his credit for necessities suitable to her station in life, unless she has adequate separate means, or is provided with an adequate allowance, either by her husband or some other person (*k*).

Where the wife is permitted to have the custody of the children, necessities for them are deemed to be necessities for her (*l*).

Effect of the husband's misconduct, where separated by mutual consent.—In *Biffin v. Bignell* (*m*), the Court of Exchequer laid down that, where a husband consents to a separation on condition that his wife shall accept a certain allowance, she has no applied authority to pledge his credit so long as the allowance is duly paid, even if it be inadequate, unless he has been guilty of such misconduct as to justify her in living apart without his consent; because, by not fulfilling the conditions on which his consent was given, she is, in effect, living apart without his consent. But in *Negus v. Forster* (*n*), where there had been an agreement for a separation with an allowance of £100 a year, and the parties had resumed cohabitation, and then again separated, and the wife had subsequently obtained a judicial separation with alimony of £180 a year, on the ground of the husband's misconduct prior to the second separation, it was held by the Court of Appeal that the £100 a year having been regularly paid, the original separation deed was a good defence to an action for the price of necessities supplied to the wife after the second separation but before the decree for judicial separation and alimony. And it would, therefore, seem that misconduct of the husband, combined with inadequacy of the wife's income, does not give her implied authority to pledge his credit, where the amount of such income has been expressly agreed upon, and is duly paid.

Where no agreement as to maintenance.—Where there has been no agreement as to the amount of her allowance or as to her maintenance, the liability of a husband, who consents to his wife living apart, for the price of necessities supplied to her on his credit, depends upon whether she is adequately provided for or not. If he pay her an adequate allowance, she has no implied authority to pledge his credit (*o*), and he is not liable for the price of things supplied to her, even if the person supplying them has no notice of the allowance (*p*). So, he is not liable for things supplied to her, if he can show that she has adequate separate means (*q*), or that she receives adequate maintenance from some source, whether he supplies it or not (*r*). The question of adequacy

(*k*) *Johnston v. Sumner* (1858), 27 L. J. Ex. 341; 3 H. & N. 261; 117 R. R. 769; *Harvey v. Norton* (1840), 4 Jur. 42.

(*l*) *Rawlins v. Vandyke* (1800), 3 Esp. 250.

(*m*) (1862), 31 L. J. Ex. 189; 7 H. & N. 877.

(*n*) (1882), 46 L. T. 875, C. A.

(*o*) *Mizen v. Pick* (1838), 7 L. J. Ex. 153; 3 M. & W. 481; *Holder v. Cope* (1846), 2 C. & K. 437; *Emmett v. Norton* (1838), 8 C. & P. 506; *Hodgkinson v. Fletcher* (1814), 4 Camp. 70.

(*p*) *Reeve v. Conyngham* (1847), 2 C. & K. 444; *Mizen v. Pick*, *supra*.

(*q*) *Lidlow v. Wilmot* (1817), 2 Stark. 86.

(*r*) *Clifford v. Laton* (1827), 3 C. & P. 15; *Dixon v. Hurrell* (1838), 8 C. & P. 717.

is a question of fact. Where the allowance is inadequate, and she is not otherwise sufficiently provided for according to her station in life, she has implied authority to pledge his credit for suitable necessities, though she may have acquiesced in the amount of the allowance (s).

Article 16.

WHERE LIVING APART WITHOUT THE HUSBAND'S CONSENT.

Where a wife leaves her husband without his consent, or lives apart from him contrary to his wishes, she had no implied authority to pledge his credit, unless he has been guilty of such misconduct as to justify her in so leaving him or living apart (t).

Article 17.

WHERE LIVING APART IN CONSEQUENCE OF HUSBAND'S MISCONDUCT, ETC.

Where a wife has been deserted by her husband (u), or has been turned away by him without adequate cause (x), or has left him in consequence of misconduct on his part which justifies her in so leaving him (y), and is living apart from him, it is an irrebuttable presumption of law that she has authority to pledge his credit—

- (a) for necessities suitable to her station in life, unless she is adequately provided for;
- (b) for costs reasonably incurred in taking proceedings against him (z); and
- (c) where she has been given the custody of the children by reason of his misconduct, for their maintenance and education, even if they be living with her contrary to his wishes (a).

Where a wife is separated from her husband under any of the circumstances specified in this article, he is bound in equity to repay money lent to her for, and expended in, the purchase of necessities (b).

(s) *Hodgkinson v. Fletcher* (1814), 4 Camp. 70.

(t) *Hindley v. Westmeath* (1827), 6 B. & C. 200; *Johnston v. Sumner* (1858), 27 L. J. Ex. 341; 3 H. & N. 261; *Swan v. Mathieson* (1911), 103 L. T. 832.

(u) *Wilson v. Ford* (1868), 37 L. J. Ex. 60; L. R. 3 Ex. 63.

(x) *Harrison v. Grady* (1865), 13 L. T. 369; *Forristall v. Lawson, Connelly v. Lawson* (1876), 34 L. T. 903; *Thompson v. Hervey* (1768), 4 Burr. 2177.

(y) *Houlston v. Smyth* (1825), 3 Bing. 127.

(z) *Ottaway v. Hamilton* (1878), 47 L. J. C. P. 725; 3 C. P. D. 393, C. A.; *Wilson v. Ford*, *supra*. This does not extend to the costs of an indictment for assault: *Grindell v. Godmond* (1836), 6 L. J. K. B. 31; 1 N. & P. 168.

(a) *Bazeley (or Baseley) v. Forder* (1868), 37 L. J. Q. B. 237; L. R. 3 Q. B. 559; *Collins v. Cory* (1901), 17 T. L. R. 242.

(b) *Jenner v. Morris* (1861), 30 L. J. Ch. 361; *Deare v. Soutten* (1869), L. R. 9 Eq. 151; *Harris v. Lee* (1718), 1 P. W. 482. *May v. Skey* (1849), 16 Sim. 588, is overruled.

The authority referred to in this article is said to be an authority of necessity (c), and the husband is bound to pay for things ordered by the wife in the exercise thereof, even if he gave the person supplying them express notice not to trust her (d). The fact that he makes her an allowance is no defence, if the allowance be inadequate (e). But where alimony has been decreed, and duly paid, it will be presumed to be sufficient (f).

Costs of legal proceedings.—Where a wife is turned away by her husband, or is compelled to leave him in consequence of his violence, and it is necessary to take proceedings to oblige him to keep the peace, he is liable for the costs of such proceedings, as between solicitor and client, even if he allow her an adequate separate maintenance (g). So, a wife has implied authority to pledge her husband's credit for costs, as between solicitor and client, reasonably incurred in the institution and prosecution of proceedings for divorce (h). And it has been held that he is liable for costs incurred by her in filing a petition for judicial separation, even if it be not proceeded with, provided there are reasonable grounds therefor (i). But in such cases the solicitor ought, before commencing proceedings, to make proper investigation and inquiry into all the circumstances; and he is not entitled to recover the costs of unsuccessful proceedings from the husband, unless he can show that there was at least great probability of success (k). Where a husband had deserted his wife without cause, and left her without means of subsistence, it was held that she had implied authority to pledge his credit for the costs—(a) of a suit for restitution of conjugal rights; (b) of taking counsel's opinion as to whether a verbal promise of a settlement made by the husband at the time of the marriage could be enforced in equity; and (c) of consultations with her solicitor as to the best means of dealing with tradesmen who had supplied her with necessaries and were pressing her for money, and also with the landlord of a house in which she and her husband had lived, who was threatening to distrain for rent upon furniture which had been hers before marriage (l).

What degree of misconduct justifies a wife in leaving her husband.—It was decided in *Horwood v. Heffer* (m) that no amount of ill-treatment, short of personal violence, or such as to induce a reasonable fear of personal violence, would entitle a wife to pledge her husband's credit after leaving his house without his consent. But in *Houliston v. Smyth* (n) it was laid down that

(c) *Johnston v. Sumner* (1858), 27 L. J. Ex. 341; 3 H. & N. 261.

(d) *Harris v. Morris* (1801), 4 Esp. 41; and see Article 18, Illustration 4.

(e) *Baker v. Sampson* (1863), 14 C. B. (N.S.) 383.

(f) *Willson v. Smyth* (1831), 1 B. & Ad. 801. And see Article 14.

(g) *Shepherd v. Mackoul* (1813), 3 Camp. 326; *Turner v. Rooks* (1839), 10 Ad. & El. 47; 8 L. J. Q. B. 211; 2 Per. & Dav. 294; *Williams v. Fowler* (1825), M'Clel. & Y. 269.

(h) *Ottaway v. Hamilton* (1878), 3 C. P. D. 393; 47 L. J. C. P. 725, C. A.; *Stocken v. Patrick* (1873), 29 L. T. 507; *Re Wingfield*, [1904] 2 Ch. 665; 73 L. J. Ch. 797, C. A.; *Abrahams v. Buckley*, [1924] 1 K. B. 903; 93 L. J. K. B. 603.

(i) *Rice v. Shepherd* (1862), 12 C. B. (N.S.) 332; *Brown v. Ackroyd* (1856), 25 L. J. Q. B. 193; 5 El. & Bl. 819; *Taylor v. Hailstone* (1882), 52 L. J. Q. B. 101. But see *Cale v. James*, [1897] 1 Q. B. 418; 66 L. J. Q. B. 249.

(k) *Re Hooper, Baylis v. Watkins* (1864), 33 L. J. Ch. 300; *Walker v. Walker* (1897), 76 L. T. 234; *Beer v. Beer* (1906), 22 T. L. R. 367.

(l) *Wilson v. Ford* (1868), L. R. 3 Ex. 63; 37 L. J. Ex. 60.

(m) (1811), 3 Taunt. 421.

(n) (1825), 3 Bing. 127; 28 R. R. 609; *Tempany v. Hakevill* (1858), 1 F. & F. 438.

such conduct as bringing a prostitute into the house, or threatening to confine the wife in a madhouse, was equivalent to turning her away. It is clear that such cruelty as renders it no longer safe for the wife to remain in the house (o), or such conduct as causes a reasonable apprehension of personal violence (p), justifies her in leaving her husband, and living apart from him.

Article 18.

EFFECT OF ADULTERY BY THE WIFE.

A husband is under no obligation to support his wife, and she has no implied authority to pledge his credit, whether they live together or not, and even where he has himself been guilty of misconduct, after she has committed adultery, unless he connived at or has condoned the offence (q). Provided, that if, being aware of her adultery, he continues to hold her out as his agent, he is liable to the same extent as if her authority had continued, with respect to any persons dealing with her on the faith of such holding out, without notice of the determination of her authority (r).

Where a husband connives at or has condoned his wife's adultery, her implied authority is not affected thereby (s).

Illustrations.

1. A husband committed adultery with a woman whom he brought to the house where he lived with his wife, and, after treating his wife with great cruelty, turned her out of doors. Then the wife committed adultery, after which she offered to return home, but her husband refused to receive her. Held, that the husband was not liable for necessities supplied to her after her adultery (t).

2. A husband turns his wife away without cause. She commits adultery. He is not liable for goods supplied to her after the adultery, although the person supplying them had no notice of the adultery (u), and the goods were necessities (x).

3. A wife who has committed adultery has no implied authority, in the absence of connivance or condonation by her husband, to pledge his credit for the costs of divorce proceedings brought by her (y) or by her husband (z); and this rule prevails, although the wife's solicitor be unaware of her adultery and although the wife's offence consist of one act of adultery only (a).

(o) *Emery v. Emery* (1827), 1 Y. & J. 501; *Baker v. Sampson* (1863), 14 C. B. (N.S.) 383; *Hodges v. Hodges* (1796), 1 Esp. 441.

(p) *Brown v. Ackroyd* (1856), 25 L. J. Q. B. 193; 5 El. & Bl. 819.

(q) Illustrations 1 to 3; *Manby v. Scott* (1660), 1 Lev. 4.

(r) Illustration 5.

(s) Illustration 4.

(t) *Govier v. Hancock* (1796), 6 T. R. 603.

(u) *Emmett v. Norton* (1838), 8 C. & P. 506; *Atkins v. Pearce* (1857), 26 L. J. C. P. 252; 2 C. B. (N.S.) 763.

(x) *Hardie v. Grant* (1838), 8 C. & P. 512; *Cooper v. Lloyd* (1859), 6 C. B. (N.S.) 519.

(y) *Durnford v. Baker*, [1924] 2 K. B. 587; 93 L. J. K. B. 866, C. A.

(z) *Arnold v. Amari*, [1928] 1 K. B. 584; 97 L. J. K. B. 238.

(a) *Wright v. Annandale*, [1930] 2 K. B. 8; 99 L. J. K. B. 444, C. A.

4. A husband connives at his wife's adultery, and then turns her away. She has implied authority to pledge his credit for necessities, and he is liable for the price thereof, even if he gave express notice to the person supplying them not to trust her (b). The same rule applies where a husband condones his wife's adultery, and subsequently turns her away (c).

5. A husband, knowing of his wife's adultery, permitted her to continue living in his house with the children. Held, that he was liable for the price of necessities supplied to her by a tradesman who was ignorant of the circumstances (d).

Article 19.

IMPLIED AUTHORITY TO ACKNOWLEDGE DEBTS FOR NECESSARIES.

Whenever a wife has authority to pledge her husband's credit, she has also implied authority to acknowledge on his behalf a debt incurred in pursuance thereof, and such an acknowledgment, if in writing and signed by her, interrupts the operation of the Statute of Limitations (e).

Article 20.

HUSBAND NOT LIABLE UNLESS CREDIT GIVEN TO HIM.

No husband is liable for the price of necessities supplied to his wife, whether they live together or not, where exclusive credit is given to the wife (f), or to some third person, by the person supplying them.

Thus, where a wife, separated from her husband with his consent, lived with her uncle, and ordered necessities from a tradesman who gave credit to the uncle, and whose former bills for goods supplied to her had been paid by the uncle, it was held that the husband was not liable, though he did not make his wife any allowance (g). But the mere fact that the things are booked in the wife's name is not conclusive evidence of an intention to give credit to her alone. The question is whether, at the time when the contract was made, the person supplying the things intended to give credit to her to the exclusion of her husband (h). If, however, the wife be sued to judgment, that is conclusive evidence of an election to give exclusive credit to her (i).

(b) *Wilson v. Glossop* (1888), 20 Q. B. D. 354; 57 L. J. Q. B. 161, C. A.

(c) *Harris v. Morris* (1801), 4 Esp. 41; *Robinson v. Gosnold* (1703), 6 Mod. 171.

(d) *Norton v. Fazan* (1798), 1 B. & P. 226.

(e) *Gregory v. Parker* (1808), 1 Camp. 394: see Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), ss. 23, 24. But see *Ingram v. Little* (1883), 1 C. & E. 186 (unsigned acknowledgment sent with letter signed by wife referring thereto, held not a sufficient acknowledgment).

(f) *Bentley v. Griffin* (1814), 5 Taunt. 356; *Metcalfe v. Shaw* (1811), 3 Camp. 22; *Callot v. Nash* (1923), 39 T. L. R. 292.

(g) *Harvey v. Norton* (1840), 4 Jur. 42. See also *Reeve v. Conyngham* (1847), 2 C. & K. 444.

(h) *Jewsbury v. Newbold* (1857), 26 L. J. Ex. 247.

(i) Article 97, Illustration 7.

Article 21.

AUTHORITY PRESUMED FROM COHABITATION AS MAN AND WIFE.

Where a man lives with a woman as his wife, she has authority to pledge his credit, during the continuance of the cohabitation, to the same extent as if she were legally married to him (*k*).

Where there is no cohabitation, the mere fact that a man permits a woman to assume his name is not sufficient to raise a presumption of authority to pledge his credit (*l*). But if they live together as man and wife, he is liable for the price of necessaries supplied to her on his credit, even if the tradesman knew when he supplied them that they were not married (*k*). This presumed authority determines on a separation, and the mere fact that he had represented her to be his wife does not render him liable for the price of necessaries supplied to her after the separation (*m*). If, however, he held her out to third persons as his agent, they are entitled to deal with her as such, and to charge him accordingly, until they receive notice that the connection has determined (*n*).

Article 22.

CHILD HAS NO IMPLIED AUTHORITY TO PLEDGE PARENT'S CREDIT.

Children have no implied authority, as such, to pledge the credit of their parents, even for the supply of necessaries.

In the absence of proof of an express or implied contract on his part, a father is no more liable than a stranger for debts incurred by his child without his authority; and the obligation to maintain his children affords no legal inference of a promise to pay for necessaries supplied to them (*o*). To render a parent liable for things supplied to his child, the person supplying them must give some evidence of his authority or assent (*p*); but slight evidence of authority may be sufficient (*q*).

(*k*) *Watson v. Threlkeld* (1794), 2 Esp. 637; *Ryan v. Sams* (1848), 12 Q. B. 460; 17 L. J. Q. B. 271; *Blades v. Free* (1829), 9 B. & C. 167.

(*l*) *Gomme v. Franklin* (1859), 1 F. & F. 465.

(*m*) *Munro v. De Chemant* (1815), 4 Camp. 215.

(*n*) *Ryan v. Sams* (1848), 12 Q. B. 460; 17 L. J. Q. B. 271.

(*o*) *Shelton v. Springett* (1851), 11 C. B. 452; *Mortimer v. Wright* (1840), 6 M. & W. 482; *Crantz v. Gill* (1796), 2 Esp. 471.

(*p*) *Rolfe v. Abbott* (1833), 6 C. & P. 286.

(*q*) *Law v. Wilkins* (1837), 6 A. & E. 718; *Baker v. Keen* (1819), 2 Stark. 501.

CHAPTER IV.

APPOINTMENT OF AGENTS.

Article 23.

APPOINTMENT IN GENERAL.

SUBJECT to the provisions of Articles 24 and 25, and except where otherwise expressly provided by or pursuant to any statute, or by the terms of the power or authority (if any) under which the agent is appointed, an agent may be appointed either by deed, by writing, or merely by word of mouth.

An agent may be appointed by word of mouth, even where he is authorised to enter into a contract required by statute to be in writing (a); unless the statute require appointment in writing (b). Letters written by an agent within the scope of his authority, and signed by him, are a sufficient memorandum if they contain the terms of an agreement entered into by his principal, or refer to other documents containing such terms, although the agent was not specifically authorised to sign a memorandum for the purpose of binding his principal (c). So, authority to subscribe the name of the principal to the memorandum of association of a joint stock company, or to the instrument of dissolution of a building society, may be given orally (d).

Agent to purchase land.—A contract for the purchase of land made by an agent, as such, vests the equitable estate in the principal, and the contract may be enforced by the principal as against both the vendor and the agent, even if the agent were appointed orally, provided that the legal estate has not been conveyed to him (e). Where the land has been conveyed to the agent, so as to vest the legal estate in him, he is a trustee for the principal, and is not entitled to take advantage of the Law of Property Act, 1925 (f), s. 53, which provides that a declaration of trust respecting any land or any interest therein must be manifested and proved by writing (g).

Retainer of Solicitor.—A solicitor may be appointed by word of mouth to institute an action or suit, but the burden of proving that he was authorised

(a) *Mortlock v. Buller* (1804), 10 Ves. 291, 311; 7 R. R. 417; *Coles v. Trecothick* (1804), 9 Ves. 234, 249a; *Deverell v. Bolton* (1812), 18 Ves. 505, 509; *Graham v. Musson* (1839), 7 Scott, 769, 778; 8 L. J. C. P. 324; *Heard v. Pilley* (1869), L. R. 4 Ch. 548; 38 L. J. Ch. 718; *Clinan v. Cooke* (1802), 1 Sch. & Lef. 22.

(b) See, for example, the Law of Property Act, 1925 (15 Geo. 5, c. 20), ss. 53, 54.

(c) *Griffiths Cycle Corp'n. v. Humber*, [1899] 2 Q. B. 414; 68 L. J. Q. B. 969, C. A.; *Daniels v. Trefusis*, [1914] 1 Ch. 788; 83 L. J. Ch. 579. An entry in the minute book of a company, signed by the chairman, is a sufficient memorandum: *Jones v. Victoria Graving Dock Co.* (1877), 2 Q. B. D. 314; 46 L. J. Q. B. 219.

(d) *Re Whiteley, ex p. Callan* (1886), 32 Ch. D. 337; 55 L. J. Ch. 540, C. A.; *Dennison v. Jeffs*, [1896] 1 Ch. 611; 65 L. J. Ch. 435.

(e) *Heard v. Pilley* (1869), L. R. 4 Ch. 548; 38 L. J. Ch. 718; *Cave v. Mackenzie* (1877), 46 L. J. Ch. 564.

(f) 15 Geo. 5, c. 20.

(g) *Rochefoucauld v. Boustead*, [1897] 1 Ch. 196; 66 L. J. Ch. 74.

lies in all cases upon him, and therefore, as a general rule, he ought, for his own protection, to require a written retainer (*h*).

Article 24.

AUTHORITY TO EXECUTE A DEED.

Where an agent is authorised to execute a deed on behalf of his principal, his authority must be given by an instrument under seal (*i*), except where the deed is executed in the name and presence of the principal and the authority to execute it is given by him there and then, in which case it may be given by word of mouth or by signs (*k*).

So, a partner cannot bind his firm or the other partners by deed, unless expressly authorised under seal to do so (*l*), except where the deed is executed by the authority and in the presence of all the partners (*m*).

Article 25.

APPOINTMENT BY CORPORATIONS.

The appointment of an agent by a corporation must be under its common seal (*n*). Provided, that this rule does not apply to trading corporations (*o*), joint stock companies (*p*), or industrial and provident societies (*q*), nor where its application would, by reason of the frequent recurrence, insignificance, or urgency of the acts to be done, cause great inconvenience, or tend to defeat the purposes for which the corporation was created (*r*), nor where work incidental to such purposes has

(*h*) *Lord v. Kellett* (1833), 2 Myl. & K. 1; *Wiggins v. Peppin* (1837), 2 Beav. 403; *Allen v. Bene* (1841), 4 Beav. 493; *Pinner v. Knights* (1843), 6 Beav. 174; *Re Manby* (1856), 26 L. J. Ch. 313; *Maries v. Maries* (1853), 23 L. J. Ch. 154; *Owen v. Ord* (1828), 3 C. & P. 349; *Tabbarnor v. Tabbarnor* (1836), 2 Keen, 679; *Atkinson v. Abbott* (1855), 3 Drew. 251.

(*i*) *Berkeley v. Hardy* (1826), 5 B. & C. 355.

(*k*) *R. v. Longnor* (1833), 4 B. & Ad. 647.

(*l*) *Harrison v. Jackson* (1797), 7 T. R. 207.

(*m*) *Ball v. Dunsterville* (1791), 4 T. R. 313; *Burn v. Burn* (1798), 3 Ves. 578.

(*n*) *Kidderminster Corporation v. Hardwicke* (1873), L. R. 9 Ex. 13; 43 L. J. Ex. 9; *R. v. Stamford* (1844), 6 Q. B. 433; *Smith v. Cartwright* (1851), 6 Ex. 927; 20 L. J. Ex. 401.

(*o*) *South of Ireland Colliery Co. v. Waddle* (1869), L. R. 4 C. P. 617; 38 L. J. C. P. 338, Ex. Ch., affirming L. R. 3 C. P. 463; *Henderson v. Australian Steam Navigation Co.* (1855), 24 L. J. Q. B. 322; 5 El. & Bl. 409. The exception appears also to apply to a municipal corporation in exercise of a statutory power to trade: *Bourne v. St. Marylebone Borough Council* (1908), 72 J. P. 129; reverted on other grounds, *ibid.*, p. 306. See also *R. v. Cumberland JJ.* (1848), 17 L. J. Q. B. 102; 5 Dow. & L. 431 (railway company).

(*p*) Companies Act, 1929 (19 & 20 Geo. 5, c. 23), s. 29; Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 97. See, also, Metropolitan Gas Act, 1860 (23 & 24 Vict. c. 125), s. 20.

(*q*) Industrial and Provident Societies Act, 1893 (56 & 57 Vict. c. 39), s. 35.

(*r*) *Church v. Imperial Gaslight Co.* (1838), 7 L. J. Q. B. 118; 6 A. & E. 846; *Ludlow Corporation v. Charlton* (1840), 6 M. & W. 815, 822; *Clarke v. Cuckfield Union* (1852), 21 L. J. Q. B. 349; *Smith v. Birmingham, etc., Gas Co.* (1834), 1 A. & E. 526; 3 L. J. K. B. 165.

been done by the agent at the request of the corporation and the corporation has accepted the benefit of such work (s).

Thus, it was held that the engagement, by a board of guardians, of a clerk to the master of a workhouse (t) or the medical officer of an infirmary (u) must be under seal, to bind the board of guardians. Inferior servants, however, may be engaged by parol (x). The appointment of a solicitor (y) or town clerk (z) to a municipal corporation must be under seal or by act of record. Where an attorney was retained by a municipal corporation to oppose a bill in Parliament, it was held that, in the absence of a retainer under seal, he was not entitled to recover his costs (a).

Holding out.—Where a corporation holds out or permits a person to appear as its agent, it is bound by his acts as such, with respect to persons dealing with him in good faith and without notice of any informality, though he has not been formally appointed. Thus, where an attorney, who had not been appointed under seal, appeared in an action for a corporation to the knowledge of the directors, it was held that the corporation was bound by his acts as its attorney (b). So, a company may be bound by the acts of persons acting as directors of the company, though such persons have not been duly appointed directors (c).

(s) *Lawford v. Billericay R. D. C.*, [1903] 1 K. B. 772; 72 L. J. K. B. 554, C. A.; *Hodge v. Matlock Bath U. D. C.* (1910), 75 J. P. 65, C. A.

(t) *Austin v. Bethnal Green Guardians* (1874), L. R. 9 C. P. 91; 43 L. J. C. P. 100. See also *Cope v. Thames Haven Dock, etc., Co.* (1849), 3 Ex. 841.

(u) *Dyle v. St. Pancras* (1872), 27 L. T. 342.

(x) *Horn v. Ivy* (1670), 1 Vent. 47; *Church v. Imperial Gaslight Co.* (1838), 7 L. J. Q. B. 118; 6 A. & E. 846; *Austin v. Bethnal Green Guardians*, *supra*.

(y) *Arnold v. Poole Corporation* (1842), 4 M. & G. 860; 12 L. J. C. P. 97.

(z) *R. v. Stamford* (1844), 6 Q. B. 433.

(a) *Sutton v. Spectacle Makers' Co.* (1864), 10 L. T. 411; *Phelps v. Upton Snodsbury Highway Board* (1885), 1 T. L. R. 425. Comp. *Hodge v. Matlock Bath U. D. C.*, *supra*.

(b) *Faviell v. Eastern Counties Ry.* (1848), 2 Ex. 344; 17 L. J. Ex. 297. And see Article 10, Illustration 14.

(c) *Mahoney v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869, H. L.

CHAPTER V.

RATIFICATION OF UNAUTHORISED ACTS.

Article 26.

RATIFICATION EQUIVALENT TO PREVIOUS AUTHORITY.

WHERE an act is done in the name or professedly on behalf of a person without his authority by another person purporting to act as his agent, the person in whose name or on whose behalf the act is done may, by ratifying the act, make it as valid and effectual, subject to the provisions of this chapter, as if it had been originally done by his authority, whether the person doing the act was an agent exceeding his authority, or was a person having no authority to act for him at all (a).

Illustrations.

1. A enters into and signs a written contract on behalf of B, without authority. A memorandum of the contract is required by statute to be in writing. B subsequently ratifies the contract. A is deemed to have been B's duly authorised agent to sign the memorandum (b).

2. An agent, without authority, insures goods on behalf of his principal. The principal ratifies the policy. The policy is as valid as if the agent had been expressly authorised to insure the goods (c).

3. A public agent does an act in excess of his authority. The Crown ratifies the act. The act is deemed to be an act of State (d).

Article 27.

WHAT ACTS MAY BE RATIFIED.

Every act, whether lawful or unlawful (e), which is capable of being done by means of an agent, except an act which is in its inception void (f), is capable of ratification by the person in whose name or on whose behalf it is done.

(a) *Wilson v. Tunman* (1843), 6 M. & G. 236; *Bird v. Brown* (1850), 4 Ex. 786; 19 L. J. Ex. 154; *Richardson v. Oxford* (1861), 2 F. & F. 449; *R. v. Chapman*, [1918] 2 K. B. 298; 87 L. J. K. B. 1142; Article 32.

(b) *Macleay v. Dunn* (1828), 1 M. & P. 761; *Soames v. Spencer* (1822), 1 D. & R. 32, (c) *Wolff v. Horncastle* (1798), 1 B. & P. 316; *Williams v. North China Ass. Co.* (1876), 1 C. P. D. 757, C. A.

(d) *Buron v. Denman* (1848), 2 Ex. 167; *Secretary of State for India v. Kamachee Boye Sahaba* (1859), 7 Moo. Ind. App. 476, P. C.

(e) Illustrations 1, 2 and 5; *Hull v. Pickersgill* (1819), 1 Brod. & B. 282; *Wilson v. Tunman* (1843), 6 M. & G. 236; Article 32, Illustration 10.

(f) Illustrations 6 and 7; *Spackman v. Evans* (1868), L. R. 3 H. L. 171, 244, H. L.; *Banque Jacques Cartier v. Banque d'Epargne* (1887), 13 App. Cas. 111; 57 L. J. P. C. 42, P. C.

Illustrations.

1. A, on B's behalf, but without his authority, purchases from C a chattel which C has no right to sell, under such circumstances that the purchase of the chattel is a conversion. B ratifies the purchase. B is guilty of converting the chattel (g).

2. A, an agent of a corporation, assaults B on its behalf. The corporation ratifies the assault. The corporation is civilly liable to B for the assault (h).

3. A shipmaster unnecessarily, and without the authority of the owners, sells his ship. The owners may ratify the sale, which then will become valid and binding (i).

4. A, a solicitor, at the request of B, the holder of a bill of exchange, sues on the bill in the name of C without C's knowledge or authority. C ratifies the action. A is entitled to recover the amount of the bill (k).

5. A distrains B's goods in the name of B's landlord, but without the landlord's authority. The landlord may ratify the distraint, and it is then deemed to have been levied by his authority (l).

6. A signs an instrument in B's name without his authority and with intent to defraud. B cannot ratify the signature, because it is a forgery and is void in its inception (m). But if B, knowing of the forgery, by his conduct induce a third person to believe that the signature is his, and if such third person act on that belief to his detriment, B will be estopped from denying that it is his signature in any action between him and such third person (n). So, if B, knowing of the forgery, delay repudiating the signature, so that the third person thereby loses his right of action against the forger (o).

7. The directors of a company enter into a contract which is not within the scope of the memorandum of association. The contract cannot be ratified by the company, even with the assent of every shareholder, because it is *ultra vires*, and therefore void (p). So, a payment by the directors of a company, of dividends out of capital, is incapable of ratification by the shareholders (q). But a contract entered into on a company's behalf by the directors, which is within the scope of the memorandum, but is beyond the powers of the directors under the articles, of association, may be ratified by the company (r).

(g) *Hilberry v. Hutton* (1864), 33 L. J. Ex. 190; 2 H. & C. 622; Article 30, Illustration 5.

(h) *Eastern Counties Ry. v. Loom* (1861), 6 Ex. 314; 20 L. J. Ex. 196, Ex. Ch.

(i) *The Australia* (1859), 13 Moo. P. C. C. 132.

(k) *Ancona v. Marks* (1862), 31 L. J. Ex. 163; 7 H. & N. 686.

(l) *Whitehead v. Taylor* (1839), 10 A. & E. 210.

(m) *Brook v. Hook* (1871), L. R. 6 Ex. 89; 40 L. J. Ex. 51; *Greenwood v. Martins Bank*, [1933] A. C. 51; 101 L. J. K. B. 622, H. L. (E.).

(n) *M'Kenzie v. British Linen Co.* (1881), 6 App. Cas. 82, H. L.

(o) *Greenwood v. Martins Bank*, *supra*.

(p) *Ashbury Carriage Co. v. Riche* (1875), L. R. 7 H. L. 653; 44 L. J. Ex. 185, H. L.

(q) *Re Exchange Banking Co., Flitcroft's Case* (1882), 21 Ch. D. 519; 52 L. J. Ch. 217, C. A.

(r) *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366; 46 L. J. P. C. 87; *Ashbury Carriage Co. v. Riche*, *supra*.

Article 28.

WHO MAY RATIFY.

The only person who has power effectively to ratify an act is the person in whose name or on whose behalf the act was professedly done (s), and it is necessary that he should have been in existence (t) and capable of being ascertained (u) at the time when the act was done; but it is not necessary that he should be known, either personally or by name, to the person doing the act (x).

Illustrations.

1. A sheriff, acting under a valid writ of execution, wrongfully seizes goods which are not the property of the debtor. The execution creditor cannot, by becoming a party to an interpleader issue or otherwise, ratify the act of the sheriff so as to render himself liable for the wrongful seizure, because the act was not done by the sheriff on his behalf, but in performance of a public duty (y).

2. A enters into an agreement professedly on behalf of B's wife and C. B cannot ratify the agreement so as to give him a right to sue upon it jointly with his wife and C (z).

3. A is authorised to buy wheat on the joint account of himself and B, with a certain limit as to price. A, intending to buy on the joint account of himself and B, and expecting that B will ratify the contract, but not disclosing such intention to the seller, enters into a contract in his own name to buy at a price in excess of the limit. B cannot ratify the contract (a).

4. The promoters of a prospective company enter into a contract on behalf of the company before its incorporation. The company cannot ratify the contract, because it was not in existence at the time when the contract was made (b). The company may, of course, make a new contract on the same terms as the old (c), or may incur an equitable liability by reason of the perception of a benefit under the contract (d), or on the doctrine of part

(s) Illustrations 1 to 5; *Wilson v. Barker* (1833), 4 B. & Ad. 614; *Royal Albert Hall v. Winchelsea* (1891), 7 T. L. R. 362, C. A.

(t) Illustration 4.

(u) *Watson v. Swann* (1862), 31 L. J. C. P. 210; 11 C. B. (N.S.) 756.

(x) Illustration 6.

(y) *Wilson v. Tunman* (1843), 6 M. & G. 236; *Woollen v. Wright, Wright v. Woollen* (1862), 31 L. J. Ex. 513; 1 H. & C. 554, Ex. Ch.; *Walker v. Hunter* (1845), 15 L. J. C. P. 12; 2 C. B. 324; *Williams v. Williams* (1937), 81 S. J. 435.

(z) *Saunderson v. Griffiths* (1826), 5 B. & C. 909; *Heath v. Chilton* (1844), 12 M. & W. 632.

(a) *Keighley v. Durant*, [1901] A. C. 240; 70 L. J. K. B. 622, H. L.

(b) *Kelner v. Baxter* (1886), L. R. 2 C. P. 174; 36 L. J. C. P. 94; *Re Empress Engineering Co.* (1880), 16 Ch. D. 125, C. A.; *Re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16, C. A.; *Re Rotherham Alum and Chemical Co.* (1883), 25 Ch. D. 103; 53 L. J. Ch. 290, C. A.; *Scott v. Ebury* (1867), L. R. 2 C. P. 255; 36 L. J. C. P. 161; *Re Dale and Plant* (1889), 61 L. T. 206; *Melhado v. Porto Alegre, etc., Ry.* (1874), L. R. 9 C. P. 503; 43 L. J. C. P. 253; *Star Corn Millers' Co. v. Moore* (1886), 2 T. L. R. 751, C. A.; *North Sydney Investment Co. v. Higgins*, [1899] A. C. 263; 68 L. J. P. C. 42, P. C.; *Natal Land, etc., Co. v. Pauline, etc., Syndicate*, [1904] A. C. 120; 73 L. J. P. C. 22, P. C.

(c) *Howard v. Patent Ivory Co.* (1889), 38 Ch. D. 156; 57 L. J. Ch. 878.

(d) *Touche v. Metropolitan Warehousing Co.* (1871), L. R. 6 Ch. 671; *Re Dale and Plant* (1889), 61 L. T. 206; *Re English and Colonial Produce Co.*, [1906] 2 Ch. 435; 75 L. J. Ch. 831, C. A.; *Re Cinnamon Park Co.*, [1930] N. Ir. 47.

performance^(e), provided that the contract is not *ultra vires* ^(f); but it cannot ratify the contract.

5. A contracts on behalf of a volunteer corps with B, both parties thinking that the corps as an entity may be bound. The contract cannot be ratified by individual members of the corps, because it was not made on their behalf as individuals ^(g).

6. A effects an insurance on goods on behalf, generally, of every person interested. Any person interested in the goods may subsequently ratify the insurance so far as concerns his interest, and the underwriters will then be bound by the policy to that extent ^(h). So, a person may act on behalf of an heir, or an administrator, or the owner of particular property, whoever he may be, though unascertained and unknown to him, and when ascertained, the person on whose behalf the act was done may ratify it ⁽ⁱ⁾, provided that he was capable of being ascertained, and was contemplated by the person doing the act at the time when it was done ^(k).

Infants.—No action can be brought upon any ratification made after full age of any promise or contract entered into on behalf of an infant, upon which he would not have been liable during infancy ^(l).

Article 29.

CIRCUMSTANCES IN WHICH AND WITHIN WHAT TIME RATIFICATION CAN TAKE PLACE.

Ratification can only take place in accordance with and subject to the following rules and qualifications:—

- (1) Where it is essential to the validity of an act that it should be done within a certain time, the act cannot be ratified after the expiration of that time, to the prejudice of any third person ^(m).
- (2) Where an act, not being a contract, would, if it had been previously authorised, have imposed a duty on any third person, the ratification of the act cannot, of itself, impose such duty on such third person, or render him liable as for non-performance or breach thereof ⁽ⁿ⁾.
- (3) Where an act is done which, if not previously authorised nor subsequently ratified by the person on whose

^(e) *Howard v. Patent Ivory Co.* (1888), 38 Ch. D. 156; 57 L. J. Ch. 878; *Re Dale and Plant* (1889), 61 L. T. 206.

^(f) *Preston v. L. M. & N. Ry.* (1856), 5 H. L. C. 605; 25 L. J. Ch. 421; *Shrewsbury v. N. S. Ry.* (1866), L. R. 1 Eq. 593; 35 L. J. Ch. 156.

^(g) *Jones v. Hope* (1880), 3 T. L. R. 247, n., C. A.

^(h) *Hagedorn v. Oliverson* (1814) 2 M. & S. 485. But see *Boston Fruit Co. v. British and Foreign Marine Ins. Co.*, [1906] A. C. 336; 75 L. J. K. B. 537, H. L.

⁽ⁱ⁾ *Lyell v. Kennedy* (1889), 14 App. Cas. 437; 59 L. J. Q. B. 268 H. L.; *Foster v. Bates* (1843), 1 D. & L. 400.

^(k) *Watson v. Swann* (1862), 31 L. J. C. P. 210; 11 C. B. (n.s.) 756.

^(l) See *Infants Relief Act*, 1874 (37 & 38 Vict. c. 62) ss. 1, 2.

^(m) Illustrations 1 to 3. *Lord Audley's Case*, Cro. Eliz. 561.

⁽ⁿ⁾ Illustrations 4 to 6.

behalf it is done, would be a wrongful act on the part of the person doing it, the person on whose behalf it is done, in order by ratification to justify it, must ratify it at a time when he might lawfully do it himself (*o*); but the fact that before the ratification an action for the wrong has been commenced against the person doing the act does not affect the validity of the ratification (*p*).

- (4) A payment cannot be ratified after the money paid has been returned to the person who paid it (*q*); but the mere fact that the person on whose behalf a payment is made, at first repudiates it, does not prevent him from subsequently ratifying it (*r*).
- (5) The ratification of a contract must take place within a reasonable time after the contract is made, and before the time, if any, fixed for the commencement of the performance thereof by the other contracting party, in order to render it binding upon him (*s*). But the mere fact that the person on whose behalf a contract is made refuses, at first, to recognise it (*t*), or that the other contracting party repudiates it (*u*), does not, of itself, affect the validity of a subsequent ratification.

A contract of marine (*x*), but not of fire (*y*), insurance may be effectively ratified by the owner of the property insured, after the loss of the property, even if he has notice of the loss at the time of the ratification.

Where an offer is made to an agent, and is accepted by him without authority, the circumstance that the person who made the offer gives notice to the principal of the withdrawal thereof, does not, of itself, prevent the principal from subsequently ratifying the acceptance, and thereby making the contract binding on the person who made the offer (*z*).

Where an agent accepts an offer, expressly subject to ratification, the offer may be withdrawn at any time before ratification (*a*).

(*o*) *Bird v. Brown* (1850), 4 Ex. 786; 19 L. J. Ex. 154.

(*p*) Illustration 7.

(*q*) Illustration 8.

(*r*) *Simpson v. Eggington* (1855), 10 Ex. 845; 102 R. R. 867.

(*s*) *Metropolitan Asylum Board v. Kingham* (1890), 6 T. L. R. 217.

(*t*) *Soames v. Spencer* (1822), 1 D. & R. 32.

(*u*) *Re Tiedemann*, [1899] 2 Q. B. 66; 68 L. J. Q. B. 852. Illustration 9. But see note (*l*), p. 39, *post*.

(*z*) *Williams v. North China Assurance Co.* (1876), 1 C. P. D. 747, C. A.; *Cory v. Patton* (1874), L. R. 9 Q. B. 577; 43 L. J. Q. B. 181.

(*y*) *Grover v. Mathews*, [1910] 2 K. B. 401; 79 L. J. K. B. 1025.

(*a*) Illustration 9. But see note (*l*), p. 39, *post*.

(*a*) *Watson v. Davies*, [1931] 1 Ch. 455; 100 L. J. Ch. 87.

Illustrations.

1. A, without the authority of the landlord, gives a tenant notice to quit. The notice cannot be made binding on the tenant by the landlord's ratification after the time for giving notice has expired (b).

2. It is agreed between A and B, who are partners, that on the death of either of them the survivor shall have the option of purchasing the share of the deceased upon giving notice to his executors within three months after the death. A dies, and within three months after his death, C, on B's behalf, but without his authority, gives notice to the executors of B's intention to exercise the option. Such notice cannot be ratified after the expiration of the three months so as to bind the executors (c).

3. The agent of a consignor of goods, without the authority of his principal, gave notice of stoppage *in transitu* on the principal's behalf. The goods afterwards arrived at their destination, and were formally demanded by the trustee in bankruptcy of the consignee. It was held that the consignor could not subsequently ratify the stoppage *in transitu* and so divest the property in the goods, which had in the meantime vested in the consignee's trustee in bankruptcy (d).

4. A, being indebted to B, tenders the amount of the debt. Subsequently, C demands the debt in B's name and on his behalf, but without his authority. B cannot ratify the demand so as to defeat A's plea of tender (e).

5. A has possession of goods belonging to B. C demands the goods on B's behalf, but without his authority. B cannot ratify the demand so as to entitle him to maintain an action against A for conversion of the goods (f).

6. The owner of a ship pledges a policy of insurance thereon. The pledgee, without the authority of the owner, gives notice of abandonment to the underwriters. The owner cannot ratify the notice of abandonment so as to render the underwriters liable as for a constructive total loss (g).

7. An agent, after the death of his principal, distrained in the principal's name for rent due. Held, that the executor might ratify the distress, and so justify the agent, although an action was at the time of the ratification pending against the agent for the trespass, and although the distress was levied before probate (h). So, where an agent, after his principal's death, sold the principal's property professedly on behalf of the estate, it was held that the person who was subsequently granted letters of administration might ratify the sale and recover the price (i). The title of an executor arises at, and the title of an administrator relates back to, the time of the death of the deceased.

(b) *Doe d. Mann v. Walter* (1830), 10 B. & C. 626; *Doe d. Lyster v. Goldwin* (1841), 2 Q. B. 143; *Right d. Fisher v. Cuthell* (1804), 5 East 491. *Goodtitle v. Woodward* (1819), 3 B. & A. 689, must to this extent be considered overruled.

(c) *Dibbins v. Dibbins*, [1896] 2 Ch. 348; 65 L. J. Ch. 724.

(d) *Bird v. Brown* (1850), 4 Ex. 786; 80 R. R. 775.

(e) *Coles v. Bell* (1808), 1 Camp. 478, n.; *Coore v. Callaway* (1794), 1 Esp. 115.

(f) *Solomons v. Dawes* (1794), 1 Esp. 83.

(g) *Jardine v. Leathley* (1863), 32 L. J. Q. B. 132; 3 B. & S. 700.

(h) *Whitehead v. Taylor* (1839), 10 A. & E. 210.

(i) *Foster v. Bales* (1843), 12 M. & W. 226; 13 L. J. Ex. 88.

8. A, without B's authority, pays a debt owing by B. The creditor, upon discovering that A was not authorised to pay the debt, returns the money to him. B cannot subsequently ratify, or take advantage of, the payment (*k*).

9. A made an offer to B, the managing director of a company, and it was accepted by him on the company's behalf. B had no authority to accept the offer. A then gave the company notice that he withdrew his offer, and the company subsequently ratified B's unauthorised acceptance. Held, by the Court of Appeal, that the maxim "*omnis ratihabitio retrotrahitur et mandato priori æquiparatur*" applied, and that the ratification dated back to the time of the acceptance, rendering the withdrawal of the offer inoperative. Specific performance decreed against A (*l*).

Article 30.

CONDITIONS NECESSARY FOR RATIFICATION.

In order that a person may be deemed to ratify an act done without his authority, it is necessary that, at the time of the ratification, he should have full knowledge of all the material circumstances in which the act was done (*m*), unless he intend to ratify the act, and take the risk, whatever the circumstances may have been (*n*). But it is not necessary that he should have knowledge of the legal effect of the act (*o*), or of collateral circumstances affecting the nature thereof (*p*).

Illustrations.

1. An agent wrongfully distrains certain goods without the authority of the principal, and pays over the proceeds to the principal. The principal is not deemed to have ratified the wrongful distress by receiving the proceeds, unless he received them with a full knowledge of the irregularity, or intended without inquiry to take the risk upon himself (*g*). So, a principal will not be deemed to ratify a voidable transaction unless he knows that it is voidable (*r*).

2. An agent, with authority to distrain for rent, wrongfully seized and sold a fixture, and paid the proceeds to the principal, who received them without

(*k*) *Walter v. James* (1871), L. R. 6 Ex. 124; 40 L. J. Ex. 104.

(*l*) *Bolton Partners v. Lambert* (1888), 41 Ch. D. 295; 58 L. J. Ch. 425, C. A.; *Re Portuguese Copper Mines, Ltd., Ex p. Badman, Ex p. Bosanquet* (1890), 45 Ch. D. 16; *Re Tiedemann*, [1899] 2 Q. B. 66; 68 L. J. Q. B. 852. These cases are of doubtful authority, the Judicial Committee of the Privy Council having, in *Fleming v. Bank of New Zealand*, [1900] A. C. 577, at p. 587; 69 L. J. P. C. 120, reserved liberty to reconsider them.

(*m*) Illustrations 1 and 2. *Edwards v. L. & N. W. Ry.* (1870), L. R. 5 C. P. 445; 39 L. J. C. P. 241; *Banque Jacques Cartier v. Banque D'Epargne* (1887), 13 App. Cas. 111; 57 L. J. P. C. 42, P. C.; *The Bonita, The Charlotte* (1861), 30 L. J. Ad. 145; Lush. 252; *Gunn v. Roberts* (1874), L. R. 9 C. P. 331; 43 L. J. C. P. 233; *Wall v. Cockerell* (1863), 10 H. L. Cas. 229; 32 L. J. Ch. 270, H. L.; *De Bussche v. Alt* (1878), 8 Ch. D. 286; 47 L. J. Ch. 381, C. A.

(*n*) Illustrations 3 and 4. *Hunter v. Parker* (1840), 7 M. & W. 322; *Marsh v. Joseph* [1897] 1 Ch. 214; 66 L. J. Ch. 128, C. A.

(*o*) *Powell v. Smith* (1872), L. R. 14 Eq. 85; 41 L. J. Ch. 734. (*p*) Illustration 5.

(*g*) *Lewis v. Read* (1845), 14 L. J. Ex. 295; 13 M. & W. 834.

(*r*) See *Spackman v. Evans* (1868), L. R. 3 H. L. 171; *Savery v. King* (1856), 5 H. L. Cas. 627; 25 L. J. Ch. 492.

notice of the illegality. Held, that the principal had not ratified the trespass (*s*).

3. An agent, without authority, signed a distress warrant, and, after the distress, informed his principal, who said that he should leave the matter in the agent's hands. Held, that this was a ratification of the whole transaction, though there had been irregularities in levying the distress of which the principal had no knowledge (*t*).

4. An agent entered into an agreement on behalf of his principal. A letter from the principal, saying that he did not know what the agent had agreed to, but that he must support him in all he had done, was held to be a sufficient ratification of the agreement, whatever it might be (*u*).

5. An agent purchased a chattel on his principal's behalf from a person who had no right to sell it, and the principal ratified the purchase. Held, that the principal was guilty of a conversion of the chattel, though he had no knowledge at the time of the ratification that the sale was unlawful. Here, the circumstances rendering the transaction a conversion were collateral to and did not form part of the contract ratified (*x*).

Article 31.

HOW AN ACT MAY BE RATIFIED.

The ratification of an act or transaction may be express or implied. A ratification will be implied whenever the conduct of the person, in whose name or on whose behalf the act or transaction is done or entered into, is such as to show that he intends to adopt or recognise such act or transaction in whole or in part (*y*); and in the case of an agent exceeding his authority, may be implied from the mere silence or acquiescence of the principal (*z*). The adoption of part of a transaction operates as a ratification of the whole (*a*).

It is not necessary that the ratification of a written contract should be in writing, even if the contract be one which is

(*a*) *Freeman v. Rosher* (1849), 13 Q. B. 780; 18 L. J. Q. B. 340; *Becker v. Ribbold* (1913), 30 T. L. R. 142.

(*t*) *Haselar v. Lemoyne* (1858), 28 L. J. C. P. 103; 5 C. B. (N.S.) 530.

(*u*) *Fitzmaurice v. Bayley* (1856), 26 L. J. Q. B. 114; 6 El. & Bl. 868.

(*x*) *Hilberry v. Hatton* (1864), 2 H. & C. 822; 33 L. J. Ex. 190.

(*y*) Illustrations 1 to 11. *Benham v. Batty* (1865), 12 L. T. 266; *Hawley v. Sentance* (1863), 7 L. T. 745; *Bigg v. Strong* (1858), 4 Jur. (N.S.) 983; *Clarke v. Perrier* (1879), 2 Freem. 48; *Keay v. Fenwick* (1876), 1 C. P. D. 745, C. A.; *Smith v. Cologan* (1788), 2 T. R. 189.

(*z*) Illustrations 5 and 10. *Prince v. Clark* (1823), 1 B. & C. 186; 25 R. R. 352; *Pott v. Bevan* (1844), 1 C. & K. 335; *The Australia* (1859), 13 Moo. P. C. C. 132, P. C.; *Robinson v. Gladow* (1835), 2 Bing. N. C. 156.

(*a*) Illustrations 2 to 4. *Hovil v. Pack* (1806), 7 East 164; *Ferguson v. Carrington* (1829), 9 B. & C. 59; *Keay v. Fenwick* (1876), 1 C. P. D. 745, C. A.; *Bristow v. Whitmore* (1861), 9 H. L. Cas. 391; 31 L. J. Ch. 467, H. L.; *Frizione v. Tagliaferro* (1856), 10 Moo. P. C. C. 175, P. C.; *Redmell v. Eden* (1859), 1 F. & F. 542.

unenforceable unless evidenced by writing (b), but the execution of a deed can only be ratified by matter of record or by deed (c).

Ratification by companies.—An act or transaction done or entered into on behalf of a company may be ratified by the directors, if they have power to do or enter into such an act or transaction on behalf of the company (d); and a ratification by the directors may be implied from part performance (d). Where the act or transaction is beyond the powers of the directors, it can only be effectively ratified by the shareholders (e). An act done by the directors in excess of their powers, but within the scope of the memorandum of association, may be ratified by ordinary resolution of the shareholders (f), and a ratification by the shareholders is implied if they acquiesce in such an act with a knowledge of the circumstances (g).

Illustrations.

1. A shipmaster unnecessarily, and without authority, sells his ship. The owners receive the purchase-money with a full knowledge of the circumstances in which the ship was sold. The receipt of the purchase-money is a ratification of the sale (h).

2. A is a bankrupt. B, at the request of A's wife, purchases certain bonds with A's money, and hands them to her. The trustee in bankruptcy seizes some of the bonds as part of A's estate. The trustee in bankruptcy has ratified the act of B, and thereby discharged him from liability (i).

3. A is a bankrupt. B wrongfully sells part of A's property. The trustee in bankruptcy accepts the proceeds or part thereof, or otherwise recognises B as his agent in the transaction. B is deemed to have been duly authorised by the trustee to sell the property (k).

4. An agent purchases goods on behalf of his principal at a price exceeding his limit. The principal objects to the contract, but disposes of some of the goods as his own. He is deemed to have ratified the contract, and is bound by it (l).

5. A wife purchases goods, which are not necessities, in the name of her husband. The husband has control over the goods, and does not return them

(b) *Maclean v. Dunn* (1828), 1 M. & P. 761; *Soames v. Spencer* (1822), 1 D. & R. 32.

(c) See *Orford v. Crow*, [1893] 3 Ch. 535; *Hunter v. Parker* (1840), 7 M. & W. 322; *Tupper v. Foulkes* (1861), 30 L. J. C. P. 214; 9 C. B. (N.S.) 797.

(d) *Wilson v. West Hartlepool, etc., Ry.* (1864), 2 De G. J. & S. 475; *Reuter v. Electric Telegraph Co.* (1856), 26 L. J. Q. B. 46; 6 El. & Bl. 341; *Hooper v. Kerr* (1901), 23 L. T. 729. Illustration 10.

(e) *Spackman v. Evans* (1868), L. R. 3 H. L. 171, H. L.

(f) *Grant v. U. K. Switchback Ry.* (1888), 40 Ch. D. 135, C. A. But see *Boschoek, etc., Co. v. Fuks*, [1906] 1 Ch. 148; 75 L. J. Ch. 261.

(g) *London Financial Association v. Kelk* (1883), 26 Ch. D. 107; *Evans v. Smallrombe* (1868), L. R. 3 H. L. 249; 37 L. J. Ch. 793, H. L.; *Re Magdalena Steam Navigation Co.* (1860), 29 L. J. Ch. 667; *MacLae v. Sutherland* (1854), 23 L. J. Q. B. 229; 3 E. & B. 1; *Phosphate of Lime Co. v. Green* (1871), L. R. 7 C. P. 43.

(h) *The Bonita, The Charlotte* (1861), Lush. 252; *Hunter v. Parker* (1840), 7 M. & W. 322.

(i) *Wilson v. Poulter* (1724), 2 Str. 859. See also *Union Bank of Australia v. McClintock*, 1922] 1 A. C. 240; 91 L. J. P. C. 108, P. C.

(k) *Brewer v. Sparrow* (1827), 7 B. & C. 310; *Lythgoe v. Vernon* (1860), 29 L. J. Ex. 104. *Comp. Valpy v. Sanders* (1848), 17 L. J. C. P. 249; 5 C. B. 687.

(l) *Cornwall v. Wilson* (1750), 1 Ves. 510.

to the seller. He is deemed to ratify the contract, and must pay for the goods (m).

6. A employs a broker to execute a distress warrant. The broker, in executing the warrant, illegally seizes goods belonging to B. In answer to a letter from B demanding compensation, A writes that his solicitor will accept service of any process B thinks proper to issue. This reply is evidence of a ratification by A of the wrongful seizure (n).

7. A party to a contract which is fraudulent and voidable as against him sues on the contract. He is deemed to ratify the entire contract (o). But a principal is not deemed to ratify a contract merely because, after repudiating it, he enters into negotiations for a compromise with the other contracting party (p).

8. A debtor whose debt has been paid without his authority pleads the payment in an action by the creditor for the debt. The plea is a sufficient ratification by the debtor of the payment (q).

9. A receives the rents of certain property for many years without the authority of the owner. The owner sues A for possession, and for an account of the rents and profits. The action is a sufficient ratification to render A the agent of the owner from the commencement (r).

10. The chairman and deputy-chairman of directors, and the secretary, of a manufacturing company, respectively ordered goods which were necessary for the purposes of the business of the company, and the goods were supplied and used therein. Held, that though the goods were ordered without authority the directors must be taken to have known that they had been supplied and used in the business, and that therefore the company was liable for the price (s).

11. A contracts to do certain specified repairs to a ship. An agent of the shipowner, whose authority is to the knowledge of A limited to the repairs so specified, sanctions certain variations in the work, and the repairs are executed according to the contract as varied. The shipowner sells the ship as repaired. The sale is not a ratification of the unauthorised variations (t).

Article 32.

EFFECT OF RATIFICATION.

The effect of ratification is to invest the person on whose behalf the act ratified was done, the person who did the act, and third persons, with the same rights, duties, and liabilities

(m) *Washman v. Wakefield* (1807), 1 Camp. 120.

(n) *Carter v. St. Mary Abbott's Vestry* (1900), 64 J. P. 548, C. A.

(o) *Ferguson v. Carrington* (1829), 9 B. & C. 59.

(p) *Barrett v. Irvine*, [1907] 2 Ir. R. 462, C. A.

(q) *Belshaw v. Bush* (1852), 22 L. J. C. P. 24; 11 C. B. 191. See also *Simpson v. Eggington* (1855), 10 Ex. 845.

(r) *Lyell v. Kennedy* (1889), 14 App. Cas. 437, H. L.

(s) *Smith v. Hull Glass Co.* (1852), 21 L. J. C. P. 106; 11 C. B. 897; 87 R. R. 804; *Allard v. Bourne* (1863), 15 C. B. (n.s.) 468.

(t) *Forman v. The Liddesdale*, [1900] A. C. 190; 69 L. J. P. C. 44, P. C.

in all respects as if the act had been done with the previous authority of the person on whose behalf it was done (*u*). Provided, that no ratification can operate to divest or prejudicially affect any proprietary right vested in any third person at the time of the ratification (*x*). Provided also, that the ratification of a contract does not give the person who ratifies it a right of action in respect of any breach thereof committed before the time of the ratification (*y*).

Ratification does not, of itself, give any new authority to the person whose act is ratified (*z*).

Illustrations.

1. A British naval commander destroyed certain property and released certain slaves belonging to a Spanish subject resident abroad. The foreign and colonial Secretaries of State ratified the act of the commander. Held, that the ratification rendered the act an act of State, for which no action would lie at the suit of the Spanish subject (*a*).

2. A purchases a chattel on behalf of B, under such circumstances that the dealing with the property in the chattel is a conversion. B ratifies the purchase. A and B are jointly and severally liable for the conversion (*b*).

3. A, an agent of a corporation, assaults B, for the supposed benefit of the corporation. The corporation ratifies the assault. It is liable to B in an action for damages (*c*).

4. A, on B's behalf, but without his authority, distrains goods belonging to C. B ratifies the distress. If B had a right to distrain, A is discharged from liability, the ratification having a retroactive effect, and rendering the distress lawful *ab initio* (*d*). If B had no right to distrain, A and B are jointly and severally liable as trespassers (*e*).

5. A makes a contract on behalf of B without his authority. B ratifies the contract. B is liable on the contract, and A is discharged from liability unless he contracted personally (*f*).

6. An agent does an act in excess of his authority. The principal ratifies the act. The agent is not liable to the principal for having exceeded his authority (*g*).

(*u*) See the judgments in *Wilson v. Tunman* (1843), 6 M. & G. 236; and *Bird v. Brown* (1850), 4 Ex. 786; Illustrations 1 to 14; *Jennings v. Moore* (1708), 2 Vern. 609.

(*x*) Illustration 15; *Re Gloucester Election Petition*, *Ford v. Newth*, [1901] 1 K. B. 683; 70 L. J. K. B. 459.

(*y*) *Kidderminster v. Hardwicke* (1873), L. R. 9 Ex. 13; 43 L. J. Ex. 9.

(*z*) *Irvine v. Union Bank of Australia* (1877), 2 App. Cas. 366; 46 L. J. P. C. 87, P. C. A ratification may be conditional; *Holt v. Brien* (1821), 4 B. & Ald. 252.

(*a*) *Buron v. Denman* (1848), 2 Ex. 167. See also *Secretary of State for India v. Kamachee Boye Sahaba* (1859), 13 Moo. P. C. 22, P. C.

(*b*) *Hilberry v. Hatton* (1864), 2 H. & C. 822; 33 L. J. Ex. 190; and see *Irving v. Motly* (1831), 7 Bing. 543.

(*c*) *Eastern Counties Ry. v. Broom* (1851), 6 Ex. 314; 20 L. J. Ex. 196, Ex. Ch.

(*d*) *Whitehead v. Taylor* (1839), 10 A. & E. 210; *Hull v. Pickersgill* (1819), 1 Brod. & B. 282.

(*e*) See *Bird v. Brown* (1850), 4 Ex. 786.

(*f*) *Spittle v. Lavender* (1821), 5 Moore 270; *Koenigsblatt v. Sweet*, [1923] 2 Ch. 314, C. A. (*g*) *Clarke v. Perrier* (1679), 2 Freem. 48; *Smith v. Cologan* (1788), 2 T. R. 189; *Cornwall v. Wilson* (1750), 1 Ves. 510; *Risbourn v. Bruckner* (1858), 27 L. J. C. P. 90; 3 C. B. (N.S.) 812.

7. A converts the property of a bankrupt by selling or disposing of it without the authority of the trustee in bankruptcy. The trustee ratifies the sale or disposition by receiving the proceeds or otherwise. A is discharged from liability in respect of the conversion (*h*).

8. A factor contracts to purchase goods on his principal's behalf at a price exceeding his limit. The principal ratifies the contract. He must pay the factor the full price (*i*).

9. The relatives of a deceased person order an extravagant funeral. If the executor or administrator ratifies the order, he is personally liable for the whole expense (*k*).

10. The secretary of a company, without the authority of the directors, sends out a notice purporting to have been issued by order of the board, convening an extraordinary general meeting, a requisition for such meeting having been duly served on the company in accordance with the articles of association. At a board meeting held two days before the date for which the general meeting is called, the directors resolve to ratify and confirm the issuing of the notice by the secretary. The notice is thereby rendered valid, and the meeting is duly summoned (*l*).

11. A insures goods, in which he has no insurable interest, on behalf of B. B, who has an insurable interest in the goods, ratifies the insurance. The insurable interest of B is sufficient to support an action by A on the policy (*m*).

12. The managing owner of a ship sells her through his agent. His co-owners ratify the sale. The owners are jointly liable to the agent for his commission (*n*). So, if a principal ratify the act of a sub-agent, he is liable to the sub-agent for his commission (*o*).

13. A shipmaster entered into contracts with the Admiralty for the transport of troops, and paid and incurred various sums and liabilities to enable him to perform the contracts, the shipowner being bankrupt, and having mortgaged the vessel. Held, that the master had a right to be repaid the expenses and indemnified against the liabilities, out of the freight due from the Admiralty, the assignees in bankruptcy and mortgagees not being entitled to take the benefit of the contract, unless they also adopted the burdens connected therewith (*p*).

14. An agent defends an action brought against him for breach of a contract entered into by him on behalf of his principal. The principal ratifies what he has done. The principal must indemnify the agent against the damages and costs recovered by the plaintiff in the action (*q*) So, where a person is

(*h*) *Brewer v. Sparrow* (1827), 7 B. & C. 310; *Wilson v. Poulter* (1724), 2 Str. 859; *Smith v. Baker* (1873), L. R. 8 C. P. 350; 42 L. J. C. P. 155; *Lythgoe v. Vernon* (1860), 29 L. J. Ex. 164.

(*i*) *Cornwall v. Wilson* (1750), 1 Ves. 510.

(*k*) *Brice v. Wilson* (1838), 8 A. & E. 349; *Lucy v. Watrond* (1837), 3 Bing. N. C. 841.

(*l*) *Hooper v. Kerr* (1901), 83 L. T. 729.

(*m*) *Wolff v. Horncastle* (1798), 1 B. & P. 316.

(*n*) *Keay v. Fenwick* (1876), 1 C. P. D. 745, C. A.

(*o*) *Mason v. Clifton* (1863), 3 F. & F. 899.

(*p*) *Bristow v. Whitmore* (1861), 9 H. L. Cas. 391; 31 L. J. Ch. 467.

(*q*) *Frizzone v. Tagliaferro* (1856), 10 Moo. P. C. C. 175, P. C.; and see *Gleadow v. Hull Glass Co.* (1849), 19 L. J. Ch. 44.

made a party to an action without his authority, he cannot avail himself of the benefit of the action, unless he pays the costs of conducting it (*r*).

15. A commodore in the navy, without authority to do so, appointed a captain. Held, that even if the Crown ratified the appointment, that would not give the commodore the right to share as a commodore with a captain under him, in prizes taken before the date of the ratification, because the rights to the various shares in those prizes would then be already vested (*s*).

(*r*) *Hall v. Laver* (1842), 1 Hare 571; 58 R. R. 198.

(*s*) *Donelly v. Popham* (1807), 1 Taunt. 1; 9 R. R. 687.

CHAPTER VI.

AUTHORITY OF AGENTS.

THE authority of an agent may be express or implied. Its nature and extent may be defined by a power of attorney, a formal instrument under seal, by writing not under seal, or by verbal instructions, or may be inferred from a course of dealing between the parties (a). Authority may be implied from the situation of the parties, the circumstances of the particular case, the usage of trade or business, or the conduct of the principal.

Article 33.

AUTHORITY CANNOT EXCEED POWERS OF PRINCIPAL.

The authority, whether express or implied, of every agent is confined within the limits of the powers of his principal (b).

Thus, an agent of a corporation or incorporated company cannot have any authority, express or implied, to do any act on behalf of the corporation or company which is *ultra vires* (b).

Article 34.

CONSTRUCTION OF AUTHORITY GIVEN IN GENERAL TERMS.

Authority conferred in general terms is construed as authority to act only in the usual way, and according to the ordinary course of business.

In particular, an agent who is authorised to receive payment of money has, *prima facie*, no authority to receive payment otherwise than in cash, unless it be usual or customary in the particular business to receive payment in some other form, and such usage or custom be reasonable or known to the principal at the time when he confers the authority (c). Where, however, the debtor to the principal is financially embarrassed, the agent's duty is to do his best to collect all that he can in the circumstances (d).

Illustrations.

1. A stockbroker is authorised to sell stock or shares. He has no authority to sell on credit, because it is not usual to sell stock or shares on credit (e).

(a) *Pole v. Leask* (1860), 28 Beav. 562; 29 L. J. Ch. 888.

(b) *Shrewsbury, etc. Ry. v. L. & N. W. Ry.* (1857), 6 H. L. Cas. 113, H. L.; *Montreal Assurance Co. v. McGillivray* (1859), 13 Moo. P. C. C. 87, P. C.; *Poullton v. S. W. Ry.* (1867), L. R. 2 Q. B. 534; 36 L. J. Q. B. 294; *Ashbury Railway Carriage Co. v. Riche* (1875), L. R. 7 H. L. 653; 44 L. J. Ex. 185, H. L.

(c) Illustrations 4 to 8; and see Article 41, and Article 100, Illustrations 14 to 17.

(d) *Gokal Chand-Jagan Nath v. Nand Ram Das-Atma Ram*, [1939] A. C. 106; 108 L. J. P. C. 9, P. C.

(e) *Willshire v. Sims* (1808), 1 Camp. 258.

2. A is authorised to sell and warrant certain goods. He cannot bind his principal by a warranty given at any other time than at the sale of the goods (*f*).

3. On the dissolution of a partnership, authority is given to one of the partners by his co-partners—(1) to settle the partnership affairs (*g*), or (2) to receive all debts owing to, and to pay all debts owing by, the firm (*h*). In neither case has he authority to draw, accept, or indorse bills of exchange in the name of the firm.

Authority to receive payment of money.

4. A is authorised to receive payment of money. He has no authority—(1) to receive payment before the money is due, and if his authority be revoked before that time, the debtor is not discharged by such a payment (*i*); (2) to receive payment by cheque (*k*), unless in the particular business in which he is employed it is usual so to receive payment (*l*); the burden of proving any such custom lies on the person who seeks to establish the authority (*k*); or (3) to receive payment by way of set-off or settlement of accounts between himself and the debtor (*m*).

5. It is provided by the conditions of a sale by auction that the purchase-money for the goods sold shall be paid to the auctioneer. The auctioneer has no authority to receive a bill of exchange in payment, and if his authority to receive payment be revoked during the currency of the bill, such a payment does not discharge the purchaser (*n*). So, an insurance broker has no authority to take a bill of exchange in payment of a claim, of which he is authorised to receive payment (*o*).

6. An agent is authorised to receive payment of an account, and to retain part of the amount in discharge of a debt due to him from the principal. He has authority, to the extent of his debt, to settle in his own way with the debtor of his principal (*p*).

7. A authorises B, a stockbroker, to receive money due from C, also a stockbroker. B has no authority to settle with C by way of set-off (*q*).

(*f*) *Helyear v. Hawke* (1803), 5 Esp. 72.

(*g*) *Abel v. Sutton* (1800), 3 Esp. 108. See, also, *Odell v. Cormack* (1887), 19 Q. B. D. 223. Cp. *Smith v. Winter* (1838), 4 M. & W. 454; 8 L. J. Ex. 34.

(*h*) *Kilgour v. Finlyson* (1789), 1 H. Bl. 156.

(*i*) *Breming v. Mackie* (1862), 3 F. & F. 197.

(*k*) *Papè v. Westcott*, [1894] 1 Q. B. 272; 63 L. J. Q. B. 222, C. A.; *Blumberg v. Life Interests, etc. Corporation*, [1897] 1 Ch. 171; [1898] 1 Ch. 27; 66 L. J. Ch. 127, C. A. But a cheque payable to the agent's order, which is honoured on presentation, is equivalent to cash: see *Bradford v. Price* (1923), 92 L. J. K. B. 871; *Clay Hill Brick and Tile Co., Ltd. v. Rawlings*, [1939] 4 A. E. R. 100.

(*l*) *Bridges v. Garrett* (1870), L. R. 5 C. P. 451; 39 L. J. C. P. 251, Ex. Ch.; *Walker v. Barker* (1900), 16 T. L. R. 393.

(*m*) *Underwood v. Nicholls* (1885), 25 L. J. C. P. 79; 17 C. B. 239; *Sweeting v. Pearce* (1859), 29 L. J. C. P. 266; 7 C. B. (n.s.) 449; *Coupe v. Collyer* (1890), 62 L. T. 927; *Wrout v. Dawes* (1858), 27 L. J. Ch. 635; 25 Beav. 369; *Legge v. Byas* (1902), 7 Com. Cas. 16. See, also, Illustration 8, and cases there cited.

(*n*) *Williams v. Evans* (1866), L. R. 1 Q. B. 352; 35 L. J. Q. B. 111; *Sykes v. Giles* (1839), 5 M. & W. 645; 9 L. J. Ex. 106.

(*o*) *Hine v. S. S. Ins. Syndicate* (1895), 72 L. T. 79, C. A.

(*p*) *Barker v. Greenwood* (1836), 6 L. J. Ex. Eq. 54; 2 Y. & C. 414; 47 R. R. 431.

(*q*) *Pearson v. Scott* (1878), 9 Ch. D. 199; 47 L. J. Ch. 705; *Blackburn v. Mason* (1893), 68 L. T. 510, C. A.; *Anderson v. Sutherland* (1897), 13 T. L. R. 163.

8. A authorises B, an insurance broker, to receive the amount due under a policy of insurance from the underwriters. The underwriters in good faith settle with B by setting off a debt due to them from him, and their names are struck out of the policy. By a custom at Lloyd's, a set-off is considered equivalent to payment as between broker and underwriter. If A were aware of the custom when he authorised B to receive payment, he is bound by the settlement. Otherwise he is not bound, because the custom is unreasonable (r).

Article 35.

AUTHORITY GIVEN IN AMBIGUOUS TERMS.

Where the authority of an agent is conferred in such ambiguous terms, or the instructions given to him are so uncertain, as to be fairly capable of more than one construction, every act done by him in good faith, which is warranted by any one of those constructions, is deemed to have been duly authorised, though the construction adopted and acted upon by him was not the one intended by the principal (s).

Illustrations.

1. An agent was instructed to sell goods at such a price as would realise 15s. per ton, net cash. He sold them at 15s. 6d. per ton, subject to two months' credit. Held, that the instructions might fairly be construed as meaning either 15s. net cash, such a price as would eventually realise 15s. after allowing for interest, or a *del credere* commission; and that the sale at 15s. 6d., two months, was within the authority (t).

2. A commission agent was authorised to buy and ship 500 tons of sugar (subject to a certain limit in price, to cover cost, freight, and insurance), 50 tons more or less of no moment, if it enabled him to secure a suitable vessel. Held, that a shipment of 400 tons was a good execution of the authority (u).

3. An agent undertook to sell and transfer certain stock when the funds should be at 85 or over. Held, that he was bound to sell when the funds reached 85, and had no discretion to wait until they went higher than that price (x).

(r) *Sweeting v. Pearce* (1859), 7 C. B. (N.S.) 449; 29 L. J. C. P. 266; *Todd v. Reid* (1821), 4 B. & Ald. 210; *Bartlett v. Penland* (1830), 10 B. & C. 760; *Stewart v. Aberdeen* (1838), 4 M. & W. 211; 51 R. R. 536; *Scott v. Irving* (1830), 1 B. & Ad. 605; *Matvieff v. Crossfield* (1903), 51 W. R. 365.

(s) *Ireland v. Livingston* (1872), L. R. 5 H. L. 395; 41 L. J. Q. B. 201, H. L.; *Loring v. Davis* (1886), 32 Ch. D. 625; 55 L. J. Ch. 725; *Johnston v. Kershaw* (1867), L. R. 2 Ex. 82; 36 L. J. Ex. 44; *Weigall v. Runciman* (1916), 85 L. J. K. B. 1187, C. A.; *Gould v. S. E. & C. Ry.*, [1920] 2 K. B. 186; 89 L. J. K. B. 700; and see Illustrations.

(t) *Boden v. French* (1851), 10 C. B. 886.

(u) *Ireland v. Livingston* (1872), L. R. 5 H. L. 395; 41 L. J. Q. B. 201, H. L.

(x) *Bertram v. Godfray* (1830), 1 Knapp 381, P. C.

Article 36.

CONSTRUCTION OF POWERS OF ATTORNEY.

Powers of attorney must be strictly pursued, and are construed as giving only such authority as they confer expressly or by necessary implication (*y*). The following are the most important rules of construction—

- (1) The operative part of the deed is controlled by the recitals (*z*).
- (2) Where authority is given to do particular acts, followed by general words, the general words are restricted to what is necessary for the proper performance of the particular acts (*a*).
- (3) General words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging the special powers only when necessary for that purpose (*b*).
- (4) The deed must be construed so as to include all medium powers necessary for its effective execution (*c*).

Illustrations.

1. A power of attorney recited that the principal was going abroad, and the operative part gave authority in general terms. Held, that the authority subsisted only during the principal's absence abroad (*d*). A power of attorney to manage the principal's affairs while he is abroad, amplified by a letter from the principal to his bankers stating that he wished the power to cover the drawing of cheques upon the bank without restriction, does not authorise the attorney to draw cheques in payment of his own private debts (*e*).

2. Power was given "to demand and receive all moneys due to the principal on any account whatsoever, and to use all means for the recovery thereof, to appoint attorneys to bring actions, and to revoke such appointments, and to do all other business." Held, that "all other business" must be construed to mean all other business necessary for the recovery of the moneys, or in

(*y*) *Bryant v. La Banque du Peuple*, [1893] A. C. 170; 62 L. J. P. C. 68, P. C.; *Joumenjoy Coondoo v. Watson* (1884), 9 App. Cas. 561; 53 L. J. P. C. 80, P. C.; *Jenkins v. Gould* (1827), 3 Russ. 385; and see *Illustrations*. As to execution of deeds under powers of attorney, see p. 76, *post*. (z) *Illustration 1*.

(*a*) *Illustrations 2 and 3*; *Perry v. Holl* (1860), 29 L. J. Ch. 677; 2 De G. F. & J. 38.

(*b*) *Lewis v. Ramsdale* (1836), 55 L. T. 179; *Attwood v. Munnings* (1827), 7 B. & C. 278; *Re Bowles* (1874), 31 L. T. 365; *Harper v. Godsell* (1870), L. R. 5 Q. B. 422; 89 L. J. Q. B. 185; *Bryant v. La Banque du Peuple*, [1893] A. C. 170; 62 L. J. P. C. 68, P. C.

(*c*) *Illustrations 8 and 9*; *Withington v. Herring* (1829), 5 Bing. 442; *Howard v. Baillie* (1796), 2 H. Bl. 618; *Willis v. Palmer* (1860), 29 L. J. C. P. 194; 7 C. B. (N.S.) 340; *Routh v. Macmillan* (1863), 33 L. J. Ex. 38; 2 H. & C. 750.

(*d*) *Danby v. Coutts* (1885), 29 Ch. D. 500; 54 L. J. Ch. 577.

(*e*) *Reckitt v. Barnett*, [1929] A. C. 176; 98 L. J. K. B. 136, H. L.; *Midland Bank v. Reckitt*, [1933] A. C. 1; 102 L. J. K. B. 297.

connection therewith; and that the power of attorney gave the agent no authority to indorse a bill of exchange received by him thereunder (f).

3. A, who carried on business in Australia, gave an agent in England a power of attorney to purchase goods in connection with the business, either for cash or on credit, and where necessary in connection with any such purchases, or in connection with the business, to make, draw, sign, accept or indorse for him and on his behalf any bills of exchange or promissory notes which should be requisite or proper. It was held that the power of attorney gave no power to borrow money, and the agent, purporting to act in pursuance of the power, having given bills of exchange in respect of a loan, and misapplied the money, that A was not liable on the bills (g).

4. A power of attorney "to recover and receive all sums of money owing . . . by virtue of any security . . . and to give, sign, and execute receipts, releases, or other discharges for the same, . . . and to sell any real or personal property . . . belonging" to the principal, does not authorise the agent to exercise the statutory power of sale of real property vested in the principal as a mortgagee (h). A power of attorney giving "sole and absolute control of all my property . . . whether owned by me solely or jointly with any other person or persons" applies only to property in beneficial ownership and not to property held on trust for sale (i).

5. A resident director and manager of a mining company was authorised by deed "to direct the mine so as most effectually to promote the interests of the company, to employ workmen, provide needful implements, etc., but not to engage the credit of the company for more than £50 without the express authority in writing of the managing directors." Held, that he had no authority to bind the company by accepting bills of exchange (k).

6. An executor gave a power of attorney to transact in his name all the affairs of the testator. Held, that the agent had no authority to accept a bill of exchange in the name of the executor so as to bind him personally (l).

7. A power of attorney "from time to time to negotiate, make sale, dispose of, assign and transfer," gives no authority to pledge (m). But a power "to sell, indorse and assign," authorises an indorsement to a bank as security for a loan to the agent; such a power being construed as giving (1) authority to sell, (2) authority to indorse, and (3) authority to assign (n).

8. A partner gave his son a power of attorney "to act on his behalf in dissolving the partnership, with authority to appoint any other person as

(f) *Hogg v. Snaith* (1808), 1 Taunt. 347; *Hay v. Goldsmid* (1804), 1 Taunt. 349; *Esdaile v. La Nauze* (1835), 4 L. J. Ex. Eq. 46; 1 Y. & C. 394; *Murray v. East India Co.* (1821), 5 B. & A. 204.

(g) *Jacobs v. Morris*, [1902] 1 Ch. 816; 71 L. J. Ch. 363, C. A.

(h) *Re Dowson and Jenkins' Contract*, [1904] 2 Ch. 219; 73 L. J. Ch. 684, C. A.

(i) *Green v. Whitehead*, [1930] 1 Ch. 38; 99 L. J. Ch. 153, C. A.

(k) *Brown v. Byers* (1847), 16 L. J. Ex. 112; 16 M. & W. 252. And see *Smith v. Prosser*, [1907] 2 K. B. 735; 77 L. J. K. B. 71, C. A.

(l) *Gardner v. Baillie* (1796), 6 T. R. 591 (*Howard v. Baillie* (1796), 2 H. Bl. 618; 3 R. R. 531, was decided on the ground of ratification).

(m) *Jonnenjoy Coondoo v. Watson* (1884), 9 App. Cas. 561; 53 L. J. P. C. 80, P. C.; *De Bouchout v. Goldsmid* (1800), 5 Ves. 211.

(n) *Bank of Bengal v. Macleod* (1849), 5 Moo. Ind. App. 1; *Bank of Bengal v. Fagan* (1849), 5 Moo. Ind. App. 27, P. C.

he might see fit." Held, that this gave the son power to submit the partnership accounts to arbitration (o).

9. A power of attorney "to commence and carry on, or to defend, at law or in equity, all actions, suits, or other proceedings touching anything in which the principal or his ships or other personal estate may be in anywise concerned," authorises the attorney to sign on behalf of the principal a bankruptcy petition against a debtor of the principal (p).

A clause in a power of attorney, whereby the principal agrees to ratify and confirm whatsoever the attorney shall do or purport to do by virtue of the power, does not extend the authority given by the power (q).

Article 37.

CONSTRUCTION OF AUTHORITY NOT GIVEN UNDER SEAL.

Where the authority of an agent is given by an instrument not under seal, or is given verbally, it is construed liberally, having due regard to the object of the authority and to the usages of trade or business (r).

IMPLIED AUTHORITY.

Article 38.

TO DO WHAT IS NECESSARY FOR, OR INCIDENTAL TO, EFFECTIVE EXECUTION OF EXPRESS AUTHORITY.

Every agent has implied authority to do whatever is necessary for, or ordinarily incidental to, the effective execution of his express authority in the usual way (s).

Illustrations.

1. A is authorised to enter into a binding contract. He has implied authority to sign a memorandum thereof to satisfy the Statute of Frauds, the Sale of Goods Act, 1893, or the Law of Property Act, 1925 (t).

But it must be a memorandum of the contract authorised; and where solicitors acting upon instructions, bid for three separate lots of property at an auction and the property was knocked down to them, it was held that

(o) *Henley v. Soper* (1828), 8 B. & C. 16.

(p) *Re Wallace, ex p. Richards* (1884), 14 Q. B. D. 22; 54 L. J. Q. B. 293, C. A.

(q) *Midland Bank v. Reckitt*, [1933] A. C. 1; 102 L. J. K. B. 297.

(r) *Pole v. Leask* (1860), 28 Beav. 562; 29 L. J. Ch. 888; *Entwistle v. Dent* (1848), 1 Ex. 812; 18 L. J. Ex. 138; *Pariente v. Lubbock* (1855), 20 Beav. 588; *Gillaw v. Aberdare* (1893), 9 T. L. R. 12, C. A.; *Ex p. Howell* (1865), 12 L. T. 785; *Re Frampton* (1859), 1 De G. F. & J. 263; *Tallentire v. Ayre* (1884), 1 T. L. R. 143, C. A.

(s) *Beaufort v. Neeld* (1845), 12 C. & F. 248, H. L.; *Pole v. Leask, supra*; *Dingle v. Hare* (1859), 7 C. B. (N.S.) 145; 29 L. J. C. P. 143; *Capel v. Thornton* (1828), 3 C. & P. 352; and see Illustrations. For a case in which the question arose whether a servant had implied authority to accept help in difficulties, see *Lomas v. Jones*, [1944] 1 K. B. 4, C. A.

(t) *Durrell v. Evans* (1862), 1 H. & C. 174; 31 L. J. Ex. 337; *Wallace v. Roe*, [1903] 1 Ir. R. 32; *Rosebaum v. Belson*, [1900] 2 Ch. 267; 69 L. J. Ch. 569.

they had no authority to sign one indivisible agreement to purchase all the lots (*u*).

2. A is authorised to buy certain railway shares. He has implied authority to do everything in the usual course of business necessary to complete the bargain (*x*).

3. A is employed to get a bill of exchange discounted. He has implied authority to warrant it a good bill, but not to indorse it in the name of the principal (*y*).

4. A is authorised to receive and sell certain goods, and to pay himself a debt out of the proceeds. He has implied authority to bring an action against a third person wrongfully withholding possession of the goods (*z*).

5. An agent is employed to find a purchaser for certain property. He has implied authority to describe the property, and state to an intending purchaser any facts or circumstances which may affect its value (*a*).

6. A horse-dealer, or other person who is accustomed to buying and selling horses, authorises A to sell a horse privately. A has implied authority to give a warranty on the sale of the horse (*b*).

7. A, a person who is not accustomed to buying and selling horses, authorises his servant to sell a horse privately. The servant has no implied authority to warrant the horse (*c*).

8. A, a person who is not accustomed to buying and selling horses, authorises his servant to sell a horse at a fair or public market-place. The servant has implied authority to warrant the horse (*d*).

9. A is authorised merely to deliver a horse. He has no implied authority to warrant it (*e*).

10. An agent is authorised to receive certain rents for his own benefit. He has no implied authority to distrain for the rents (*f*).

11. An agent is employed to find a purchaser and to contract for the sale of an estate. He has no implied authority to receive the purchase-money (*g*).

12. An agent is employed to obtain payment of a bill of exchange from the acceptor. He has no implied authority to receive payment subject to a condition that the acceptor shall not be liable for the expenses of protesting the bill for non-payment (*h*).

(*u*) *Smith v. MacGowan* (1938), 159 L. T. 278.

(*x*) *Bayley v. Wilkins* (1849), 18 L. J. C. P. 273; 7 C. B. 886; 78 R. R. 849.

(*y*) *Fenn v. Harrison* (1791), 3 T. R. 757; 4 T. R. 177.

(*z*) *Curtis v. Barclay* (1826), 5 B. & C. 141.

(*a*) *Mullens v. Miller* (1882), 22 Ch. D. 194; 52 L. J. Ch. 380.

(*b*) *Howard v. Sheward* (1866), L. R. 2 C. P. 148; 36 L. J. C. P. 42; *Bank of Scotland v. Watson* (1813), 1 Dow, 45; 14 R. R. 11, H. L.; *Baldry v. Bates* (1885), 52 L. T. 620.

(*c*) *Brady v. Todd* (1861), 9 C. B. (N.S.) 592; 30 L. J. P. C. 223; overruling *Alexander v. Gibson* (1811), 2 Camp. 555.

(*d*) *Brooks v. Hassall* (1883), 49 L. T. 569.

(*e*) *Woodin v. Burford* (1834), 3 L. J. Ex. 75; 2 C. & M. 391.

(*f*) *Ward v. Shew* (1833), 2 L. J. C. P. 58; 9 Bing. 608.

(*g*) *Mynn v. Jolliffe* (1834), 1 M. & Rob. 326.

(*h*) *Bank of Scotland v. Dominion Bank*, [1801] A. C. 592, H. L. Sc.

Article 39.

IMPLIED AUTHORITY OF GENERAL AGENTS.

Every agent who is authorised to conduct a particular trade or business, or generally to act for his principal in matters of a particular nature, or to do a particular class of acts, has implied authority to do whatever is incidental to the ordinary conduct of such a trade or business (*i*), or of matters of that nature, or is within the scope of that class of acts (*k*), and whatever is necessary for the proper and effective performance of his duties (*l*); but not to do anything that is outside the ordinary scope of his employment and duties (*m*).

Illustrations.

1. A is the manager of an estate. He has implied authority to contract for the usual and customary leases (*n*), and to give and receive notices to quit to and from the tenants (*o*); and to enter into agreements with tenants authorising them to change the mode of cultivation, and providing for the basis on which compensation for improvements shall be payable on the determination of the tenancy (*p*).

2. A is the managing owner (ship's husband) of a ship. He has implied authority to pledge the credit of his co-owners for all such things, including repairs, as are necessary for the usual or suitable employment of the ship (*q*). But he has no implied authority, as managing owner, to insure the vessel on behalf of his co-owners (*r*), or to agree to pay a sum of money for the cancellation of a charterparty made by him on their behalf (*s*).

3. The manager of a beerhouse has implied authority to order cigars for such beerhouse (*t*). So, the manager of a manufacturing company has implied authority to order goods necessary for the company's business (*u*).

4. A is the manager of a business which he carries on in his own name as apparent principal. Drawing and accepting bills of exchange are incidental

(*i*) Illustrations 1 to 5.

(*k*) Illustrations 6 to 8; *Re Williams, ex p. Howell* (1865), 12 L. T. 785; *Peers v. Sneyd* (1853), 17 Beav. 151; 99 R. R. 78; *Jones v. Phipps* (1868), L. R. 3 Q. B. 567; 37 L. J. Q. B. 198; *Webber v. Granville* (1860), 30 L. J. C. P. 92. For implied authority of shipmasters, see *post*, pp. 64 to 68.

(*l*) Illustrations 8 and 15 to 17; *Langan v. G. W. Ry.* (1874), 30 L. T. 173; 26 L. T. 577, Ex. Ch.

(*m*) *Linford v. Provincial, etc., Ins. Co.* (1864), 34 Beav. 291; *Cox v. Midland Ry.* (1849), 3 Ex. 268; 77 R. R. 623; *Kreditbank Cassel v. Schenkers*, [1927] 1 K. B. 826; 96 L. J. K. B. 501, C. A. Illustrations 2 and 9 to 17.

(*n*) *Peers v. Sneyd* (1853), 17 Beav. 151.

(*o*) *Papillon v. Brunton* (1860), 29 L. J. Ex. 265; 5 H. & N. 518; 120 R. R. 704; *Jones v. Phipps* (1868), L. R. 3 Q. B. 567; 37 L. J. Q. B. 198.

(*p*) *Re Pearson*, [1899] 2 Q. B. 618; 68 L. J. Q. B. 878.

(*q*) *The Huntsman*, [1894] P. 214; *Barker v. Highley* (1863), 32 L. J. C. P. 270; 15 C. B. (N.S.) 27.

(*r*) *Robinson v. Gleadow* (1835), 2 Bing. N. C. 156; 42 R. R. 568.

(*s*) *Thomas v. Lewis* (1878), 4 Ex. D. 185; 48 L. J. Ex. 7.

(*t*) *Watteau v. Fenwick*, [1893] 1 Q. B. 346. See *Kinahan v. Parry*, [1911] 1 K. B. 459; 80 L. J. K. B. 276, C. A.

(*u*) *Smith v. Hull Glass Co.* (1852), 11 C. B. 897; 21 L. J. C. P. 106; 87 R. R. 804.

to the ordinary conduct of such a business. A has implied authority to accept a bill in the name in which the business is carried on (*i.e.*, his own name), and the principal is liable on a bill so accepted (*x*).

5. The general manager of a railway company has implied authority to order medical attendance for a servant of the company (*y*).

6. The foreman of a saw-mill has implied authority to enter into a written contract for the sale of staves (*z*).

7. A traveller for the sale of goods in the provinces on behalf of a principal in London has implied authority to receive payment in money for the goods sold by him, but not to accept other goods by way of payment (*a*).

8. The matron of a hospital has implied authority to pledge the credit of the managing committee, for meat supplied for the use of the hospital (*b*).

9. A is the bailiff of a large farming establishment, all payments and receipts in reference thereto passing through his hands. He has no implied authority, as such, to draw or indorse bills of exchange in the name of his principal (*c*).

10. A rent collector has no implied authority, as such, to receive notice to quit from a tenant (*d*). A steward has such implied authority (*e*), but not to grant leases for terms of years (*f*).

11. The cashier of a picture engraver has no implied authority to sell his master's engravings (*g*).

12. A groom or coachman has no implied authority, as such, to pledge the credit of his master for forage for the master's horses (*h*).

13. A station-master has no implied authority to pledge the credit of the railway company for medical attendance to an injured passenger (*i*).

14. *Insurance agents*.—A is the agent of an insurance company, and has authority to receive the payment of premiums within fifteen days of their becoming due. He has no implied authority to accept payment after the expiration of that time (*k*). So, a local agent of an insurance company has no implied authority to grant, or contract to grant, policies on behalf of the company, that being outside the ordinary scope of his employment and duties (*l*).

(*x*) *Edmunds v. Bushell* (1865), L. R. 1 Q. B. 97; 35 L. J. Q. B. 20.

(*y*) *Walker v. G. W. Ry.* (1867), L. R. 2 Ex. 228. Comp. Illustration 13.

(*z*) *Richardson v. Cartwright* (1844), 1 C. & K. 328.

(*a*) *Howard v. Chapman* (1831), 4 C. & P. 508; 34 R. R. 814. See *International Sponge Importers v. Watt*, [1911] A. C. 279; 81 L. J. P. C. 12, H. L.

(*b*) *Real and Personal Advance Co. v. Phalempin* (1893), 9 T. L. R. 569, C. A.

(*c*) *Davidson v. Stanley* (1841), 3 Scott, N. R. 49; 58 R. R. 556.

(*d*) *Pearse v. Boulter* (1860), 2 F. & F. 133.

(*e*) *Roe d. Rochester v. Pierce* (1809), 2 Camp. 96; 11 R. R. 673.

(*f*) *Collen v. Gardner* (1856), 21 Beav. 540; 111 R. R. 195.

(*g*) *Graves v. Masters* (1883), 1 C. & E. 73.

(*h*) *Wright v. Glyn*, [1902] 1 K. B. 745; 71 L. J. K. B. 497, C. A.

(*i*) *Cox v. Midland Ry.* (1849), 3 Ex. 268; 77 R. R. 623. See also *Houghton v. Pilkington*, [1912] 3 K. B. 308; 82 L. J. K. B. 79. Comp. *Langan v. G. W. Ry.* (1874), 30 L. T. 173; 26 L. T. 577, Ex. Ch.; and Illustration 5.

(*k*) *Accey v. Fernie* (1840), 7 M. & W. 151; 56 R. R. 671. See also *London & Lancs. Ass. Co. v. Fleming*, [1897] A. C. 499; 66 L. J. P. C. 116, P. C.

(*l*) *Linford v. Provincial, etc., Ins. Co.* (1864), 34 Beav. 291.

15. *Directors and agents of companies.*—A is the resident agent and manager of a mine for an unincorporated company. He has implied authority to purchase goods necessary for the working of the mine (*m*)—but not to borrow money, however pressing may be the necessity for a loan (*n*)—on the credit of the shareholders. So, directors of an unincorporated mining company have implied authority to employ mining officers, and purchase on the credit of the members of the company goods necessary for working the mine, and to make any other contracts usual or necessary in the management thereof in the ordinary way (*o*), but not to bind the members by negotiable instruments, nor to borrow money on their credit, either for the purpose of carrying on the mine or for any other purpose, however useful and necessary, the general rule being that directors of unincorporated companies have only such powers as are expressly or by necessary implication conferred upon them by the members (*p*). The directors of a banking or ordinary trading company have, however, implied authority to borrow money for the purpose of the business of the company (*q*). It has been held that directors who have express authority to fix the time and place for, and to adjourn, general meetings of the company, have no implied authority to postpone a general meeting which has been duly convened (*r*).

16. *Arresting offenders, etc.*—A bank manager has no implied authority to arrest or prosecute supposed offenders, on behalf of the bank (*s*). Authority to arrest or give persons into custody is only implied when the duties of the agent could not be efficiently performed without such authority (*s*). Thus, a servant has implied authority, as a general rule, to give persons into custody when such a step is necessary for the protection of his master's property, but not merely for the purpose of punishing a supposed wrongdoer (*t*). So, the manager of a restaurant has implied authority to give into custody persons behaving in a riotous manner (*u*).

17. *Servants of railway companies.*—The servants of a railway company have implied authority to remove passengers from carriages in which they are misconducting themselves or travelling without having paid the fare (*x*), and to do whatever else is necessary for the enforcement of the company's bye-laws (*y*). They have, therefore, implied authority to arrest persons

(*m*) *Hawken v. Bourne* (1841), 8 M. & W. 703; 58 R. R. 853.

(*n*) *Hawtayne v. Bourne* (1841), 7 M. & W. 595; 56 R. R. 806; *Ricketts v. Bennett* (1847), 17 L. J. C. P. 17; 4 C. B. 686; 72 R. R. 691.

(*o*) *Tredwen v. Bourne* (1840), 6 M. & W. 461; 55 R. R. 689; *Steigenberger v. Carr* (1841), 3 M. & G. 191.

(*p*) *Dickinson v. Valpy* (1829), 5 M. & R. 126; 34 R. R. 348; *Burmester v. Norris* (1851), 6 Ex. 796; 21 L. J. Ex. 43.

(*q*) *Re Hamilton's Windsor Ironworks Co., Ex p. Pitman and Edwards* (1879), 12 Ch. D. 707; *McClae v. Sutherland* (1854), 3 E. & B. 1; 23 L. J. Q. B. 229; 97 R. R. 332; *Royal British Bank v. Turquand* (1855), 24 L. J. Q. B. 327; 5 E. & B. 240.

(*r*) *Smith v. Paringa Mines*, [1906] 2 Ch. 193; 75 L. J. Ch. 702.

(*s*) *Bank of New South Wales v. Owston* (1879), 4 App. Cas. 270; 48 L. J. P. C. 25, P. C. And see Illustration 17.

(*t*) *Stevens v. Hinshelwood* (1891), 55 J. P. 341, C. A.; *Knight v. North Met. Twys. Co.* (1898), 78 L. T. 227; *Hanson v. Waller*, [1901] 1 K. B. 390; 70 L. J. K. B. 231. And see Illustration 17.

(*u*) *Ashton v. Spiers* (1893), 9 T. L. R. 606. *Comp. Stedman v Baker* (1896), 12 T. L. R. 451, C. A.

(*x*) *Lowe v. G. N. Ry.* (1893), 62 L. J. Q. B. 524.

(*y*) *Edwards v. L. & N. W. Ry.* (1870), L. R. 5 C. P. 445; 39 L. J. C. P. 241.

infringing the bye-laws, where that remedy is prescribed by statute (y). So, a railway booking clerk, part of whose duty is to keep in a till under his charge money belonging to the company, has implied authority to do all acts necessary for the protection of such money; but he has no implied authority to give into custody a person whom he suspects of having attempted to steal from the till, after the attempt has ceased and there is no further danger to the property of the company (z). So, a foreman porter, in charge of a station in the absence of the station-master, has no implied authority to give into custody a person whom he suspects to be stealing the company's property (a).

Article 40.

IMPLIED AUTHORITY WHERE EMPLOYED IN COURSE OF BUSINESS AS AGENT.

Every agent who is authorised to do any act in the course of his trade, profession, or business as an agent, has implied authority to do whatever is usually incidental, in the ordinary course of such trade, profession, or business, to the execution of his express authority (b), but not to do anything which is unusual in such trade, profession, or business, or which is neither necessary for nor incidental to the execution of his express authority (c).

Illustrations.

1. A bailiff is authorised to distrain for rent. He has implied authority to receive the rent and expenses due, and a tender thereof to him operates as a tender to the landlord (d).

2. An insurance broker is authorised to subscribe a policy for an underwriter. He has implied authority to adjust a loss arising thereunder (e), and to refer a dispute about such a loss to arbitration (f).

3. A horse-dealer is authorised to sell a horse. He has implied authority to warrant it (g).

4. A commission agent, authorised to make a bet in his own name on behalf of his principal, had implied authority to pay the bet if he lost it (h).

(y) See previous page.

(z) *Allen v. L. & S. W. Ry.* (1870), L. R. 6 Q. B. 65; 40 L. J. Q. B. 55.

(a) *Edwards v. L. & N. W. Ry.*, *supra*, note (y); *Farry v. G. N. Ry.*, [1898] 2 Ir. R. 352.

(b) *Young v. Cole* (1837), 6 L. J. C. P. 201; 3 Bing. N. C. 724; 43 R. R. 783; *Sutton v. Tatham* (1839), 8 L. J. Q. B. 210; 10 Ad. & E. 27; 50 R. R. 312; Illustrations 1 to 4. See, also, pp. 60 *et seq.* for implied authority of factors, brokers, auctioneers, solicitors, etc.

(c) *Willshire v. Sims* (1808), 1 Camp. 258; 10 R. R. 673; *Dawn v. Simmins* (1879), 41 L. T. 783, C. A.; *Poirier v. Morris* (1853), 22 L. J. Q. B. 313; 2 El. & Bl. 89; 95 R. R. 449; *Smith v. Webster* (1876), 3 Ch. D. 49; 45 L. J. Ch. 528, C. A.; Illustrations 5 to 9. See also pp. 60 *et seq.*

(d) *Hatch v. Hale* (1850), 15 Q. B. 10; 19 L. J. Q. B. 289; 81 R. R. 480. As to a tender to a man left in possession by the bailiff, see *Boulton v. Reynolds* (1859), 29 L. J. Q. B. 11; 2 El. & E. 369; 119 R. R. 765.

(e) *Richardson v. Anderson* (1805), 1 Camp. 43, n.; 10 R. R. 628, n.

(f) *Goodson v. Brooke* (1815), 4 Camp. 163.

(g) *Howard v. Sheward* (1866), L. R. 2 C. P. 148; 36 L. J. C. P. 42.

(h) *Read v. Anderson* (1884), 13 Q. B. D. 779; 53 L. J. Q. B. 532, C. A.

No action now lies, however, for the recovery from the principal of any amount so paid, in consequence of the provisions of the Gaming Act, 1892 (*i*).

5. A is employed as a general agent for the sale of goods intrusted to his possession. He has no implied authority to pledge the goods (*k*). So, authority to sell shares does not confer authority to pledge them (*l*).

6. An architect was employed to make plans for building certain houses. Having made the plans, he instructed a quantity surveyor to take out quantities, and then invited tenders, all of which exceeded the limits of the building owner's proposed expenditure. The quantity surveyor sued the building owner for his fees for taking out the quantities, relying on an alleged custom in the building trade, by which the liability for such fees was thrown on the building owner in cases where no tender was accepted. The jury having found that there was no custom by which an architect was authorised to employ a surveyor without the sanction of the building owner, and the owner not having expressly authorised the employment, it was held that the defendant was not liable (*m*).

7. A house furnisher's salesman, employed at a salary and commission, has no authority to cancel a sale effected by him (*n*).

8. A commission agent is authorised to buy goods in England on behalf of a foreign principal. It is not usual to pledge the credit of the foreign principal in such cases. The agent has no implied authority to pledge the principal's credit, and the fact that they have agreed to share the profit and loss does not affect this rule (*o*).

9. An estate agent is instructed to find a purchaser for certain property. He receives an offer, which he submits to his principal. The principal then instructs him to withdraw part of the property, and names the lowest price for the remainder. He has no implied authority to enter into a contract for the sale of the property, though the price is specified, because it is not usual for estate agents to enter into contracts on behalf of their principals, unless expressly authorised to do so, their duty being merely to submit to their principals any offers which may be made to them (*p*). But where an owner of certain houses instructed a house and estate agent to sell them, and agreed to pay a commission on the price accepted, it was held that, the agent having submitted an offer to the principal, who notified to him his acceptance of the price offered, the agent had authority to make and sign a contract for sale on the principal's behalf (*q*).

(*i*) 55 Vict. c. 9. See Article 72.

(*k*) *City Bank v. Barrow* (1880), 5 App. Cas. 664, H. L.

(*l*) *Walthe v. Brooks* (1885), 1 T. L. R. 565.

(*m*) *Antisell v. Doyle*, [1899] 2 Ir. R. 275.

(*n*) *Leckenby v. Wolman*, [1921] W. N. 100.

(*o*) *Hulton v. Bullock* (1874), L. R. 9 Q. B. 572, Ex. Ch.; *Poirier v. Morris* (1853), 2 El. & Bl. 89; 22 L. J. Q. B. 313; 95 R. R. 449.

(*p*) *Chadburn v. Moore* (1892), 61 L. J. Ch. 674; *Hamer v. Sharp* (1874), L. R. 19 Eq. 108; 44 L. J. Ch. 53; *Thuman v. Best* (1907), 97 L. T. 239; *Lewcock v. Bromley* (1920), 37 T. L. R. 48. See also *Vale of Neath Colliery v. Furness* (1876), 45 L. J. Ch. 276; cf. *Keen v. Mear*, [1920] 2 Ch. 574; 89 L. J. Ch. 513.

(*q*) *Rosenbaum v. Belson*, [1900] 2 Ch. 267; 69 L. J. Ch. 569; *Allen v. Whiteman* (1920), 89 L. J. Ch. 534.

Article 41.

AUTHORITY IMPLIED FROM SPECIAL USAGES.

Every agent has implied authority to act, in the execution of his express authority, according to the usage and customs of the particular place, market, or business in which he is employed (r).

Provided, that no agent has implied authority to act in accordance with any usage or custom which is unreasonable, unless the principal had notice of such usage or custom at the time when he conferred the authority (s), or to act in accordance with any usage or custom which is unlawful.

The question whether any particular usage or custom is unreasonable or unlawful is a question of law. In particular a usage or custom which changes the intrinsic character of the contract of agency (t), or a usage or custom whereby an agent who is authorised to receive payment of money may receive payment by way of set-off, or by way of a settlement of accounts between himself and the person from whom he is authorised to receive payment (u), is unreasonable.

Illustrations.

1. A was authorised to sell manure. The jury found that it was customary to sell manure with a warranty. Held, that A had implied authority to give a warranty on a sale of the manure (x).

2. A is authorised to sell a certain class of goods. It is customary to sell goods of that class on credit. A has implied authority to sell the goods on credit (y).

3. A share broker, employed to transact business at a particular place, has implied authority to act in accordance with the reasonable usages of that place (z).

4. A bill broker in London was intrusted with bills for discounting. The jury found that it was usual for bill brokers in London to raise money by depositing their customers' bills *en bloc*, the brokers alone being looked to by the customers, and that the parties contracted in reference to such usage. Held, that the broker had implied authority to pledge the bills together with bills of his own and those of other customers (a). The authority and duties of a bill broker depend upon the course of dealing and usage of the particular place where he is employed (a).

(r) Illustrations 1 to 10; *Sutton v. Tatham* (1839), 10 A. & E. 27; 8 L. J. Q. B. 210; 50 R. R. 312; *Harker v. Edwards* (1887), 57 L. J. Q. B. 147, C. A.; *Lienard v. Dresslar* (1862), 3 F. & F. 212.

(s) *Campbell v. Hassel* (1816), 1 Stark. 233; *Pollock v. Stables* (1848), 12 Q. B. 765; 17 L. J. Q. B. 352; 76 R. R. 419; *Robinson v. Mollett* (1874), L. R. 7 H. L. 802; 44 L. J. C. P. 362, H. L. Illustrations 9 to 12.

(t) Illustrations 9 to 11.

(u) Illustration 12,

(x) *Dingle v. Hare* (1859), 7 C. B. (N.S.) 145; 29 L. J. C. P. 143.

(y) *Pelham v. Hilder* (1841), 1 Y. & Coll. C. C. 3; 57 R. R. 208.

(z) *Pollock v. Stables* (1848), 12 Q. B. 765; 17 L. J. Q. B. 352; 76 R. R. 419.

(a) *Foster v. Pearson* (1835), 4 L. J. Ex. 120; 1 C. M. & R. 849; 40 R. R. 744.

5. A broker, a member of the Stock Exchange, when authorised to sell certain bonds, has implied authority, if it be discovered that the bonds are not genuine, to rescind the sale and repay the purchaser the price, in accordance with the usage of the Stock Exchange (b).

6. A stockbroker, authorised to buy or sell or carry over shares or stock, has implied authority, according to usage, to execute the order by means of several contracts, or to execute any portion or portions of it (c).

7. A broker, authorised to sell shares on the Stock Exchange, has implied authority to sell under the rules and regulations there in force, except so far as they are unreasonable and unknown to the principal (d), and to do all things necessary to complete the contract according to such rules and regulations (e).

8. A broker is authorised to buy wool in the Liverpool market. By a custom of that market, a broker so authorised may buy either in his own name or in the name of his principal, without giving the principal notice whether he has bought in his own name or not. Such a custom is not unreasonable, and the principal is bound by a contract made in the name of the broker, though he had no notice of the custom or of the fact that the contract was made by the broker in his own name (f).

9. A broker is authorised to buy 50 tons of tallow. It is customary in the tallow trade for a broker to make a single contract in his own name for the purchase of a sufficiently large quantity of tallow to supply the orders of several principals, and to parcel it out amongst them. The broker has no implied authority to purchase a larger quantity than 50 tons and allocate 50 tons thereof to the principal, unless the principal was aware of the usage at the time when he gave the authority, because the effect of such a usage is to change the intrinsic character of the contract of agency by turning the agent into a principal, and thus giving him an interest at variance with his duty (g).

10. By the usage of the Stock Exchange, a broker who is instructed by several principals to buy or sell or carry over shares in the same undertaking, may make one contract in his own name for the total number of shares and apportion them amongst the principals, and may include in the contract shares in which he is dealing on his own account; and thereupon the jobber with whom he deals and each principal become bound to carry out such portion of the contract as is appropriated to them respectively. The usage is reasonable and binding on a principal, whether he was aware of it or not (h).

(b) *Young v. Cole* (1837), 3 Bing. N. C. 724; 43 R. R. 783; 6 L. J. C. P. 201.

(c) *Benjamin v. Barnett* (1903), 19 T. L. R. 564.

(d) *Harker v. Edwards* (1887), 57 L. J. Q. B. 147, C. A.; *Hodgkinson v. Kelly* (1868), 37 L. J. Ch. 837; *Coles v. Bristowe* (1868), L. R. 4 Ch. 3; 38 L. J. Ch. 81; *M'Ewen v. Woods* (1847), 11 Q. B. 13; 17 L. J. Q. B. 206; 75 R. R. 274.

(e) *Bowring v. Shepherd* (1871), L. R. 6 Q. B. 309; 40 L. J. Q. B. 129, Ex. Ch.

(f) *Cropper v. Cook* (1868), L. R. 3 C. P. 194.

(g) *Robinson v. Mollett* (1874), L. R. 7 H. L. 802; 44 L. J. C. P. 362, H. L.; *Bostock v. Jardine* (1865), 34 L. J. Ex. 142; 3 H. & C. 700. Comp. Illustration 10.

(h) *Scott v. Godfrey*, [1901] 2 K. B. 726; 70 L. J. K. B. 954; *Beckhuson v. Hamblett*, [1901] 2 K. B. 73; 70 L. J. K. B. 600, C. A. See also *Re Rogers, ex parte Rogers* (1880), 15 Ch. D. 207, C. A.; *May v. Angeli* (1898), 14 T. L. R. 551, H. L.; *Consolidated Goldfields v. Spiegel* (1909), 100 L. T. 351.

In this illustration, the result of the usage is that although in form there is only one contract, in effect there are separate contracts between the jobber and each principal on which they may sue and be sued, whereas in Illustration 9 the result of the usage was that there was no contract on which the principal could sue the other contracting party at all.

11. A broker is authorised to sell stock. A custom of the Stock Exchange, whereby he is himself permitted to take over the stock at the price of the day if he is unable to find a purchaser, is unreasonable, and such a transaction is not binding on the principal unless he had notice of the custom (*i*).

12. An insurance broker is authorised to receive from the underwriters payment of money due under a policy. A custom at Lloyd's whereby the broker may settle with the underwriters by way of set-off is unreasonable, and the principal is not bound by such a settlement unless he was aware of the custom when he authorised the broker to receive payment (*k*). The same rule applies to stockbrokers settling with agents (*l*).

*Implied authority of particular classes of agents,
as incidental to their employment.*

1. Factors.

Where goods are intrusted to a factor for sale, he has implied authority—

1. To sell them in his own name (*m*).
2. To sell at such times and for such prices as he thinks best (*n*).
3. To sell on reasonable credit (*o*).
4. To warrant the goods sold, if it be usual to warrant that class of goods (*p*).
5. To receive payment of the price, if he sell in his own name (*q*).

A factor has no implied authority, as such—

1. To delegate his authority, whether acting under a *del credere* commission or not (*r*).
2. To barter (*s*) or pledge goods (*t*), or the bill of lading for goods (*u*), intrusted to him for sale. Even where he has accepted bills drawn by the principal to be provided for out of the proceeds of the goods, he has no implied

(*i*) *Hamilton v. Young* (1881), L. R. 7 Ir. 289, 1r.

(*k*) See Article 34, Illustration 8.

(*l*) See Article 34, Illustration 7.

(*m*) *Baring v. Corrie* (1818), 2 B. & A. 137; 20 R. R. 383; *Re Henley, Ex p. Dixon* (1876), 4 Ch. D. 133; 46 L. J. Bk. 20, C. A.

(*n*) *Smart v. Sandars* (1846), 17 L. J. C. P. 258; 3 C. B. 380; 75 R. R. 849.

(*o*) *Houghton v. Matthews* (1803), 3 B. & P. 485, 489; 7 R. R. 815; *Scott v. Surman* (1742), Willes, 400.

(*p*) *Dingle v. Hare* (1859), 7 C. B. (N.S.) 145; 29 L. J. C. P. 143.

(*q*) *Drinkwater v. Goodwin* (1775), Cowp. 251.

(*r*) *Cockran v. Irlam* (1813), 2 M. & S. 301; 15 R. R. 257; *Solly v. Rathbone* (1814), 2 M. & S. 298.

(*s*) *Guerreiro v. Peile* (1820), 3 B. & A. 616; 22 R. R. 500.

(*t*) *Martini v. Coles* (1813), 1 M. & S. 140; *Paterson v. Tash* (1743), 2 Str. 1178; *Guichard v. Morgan* (1819), 4 Moo. 36. See, however, Article 87 as to the rights of third persons dealing with him in good faith.

(*u*) *Newsom v. Thornton* (1805), 6 East, 17; 8 R. R. 378.

authority to raise money by pledging the goods for the purpose of meeting the bills (x).

2. Brokers.

A broker has implied authority—

1. Where he has entered into a contract, to sign an entry in his book, or to sign bought and sold notes, on behalf of both buyer and seller, as a memorandum of the contract for the purpose of satisfying the provisions of section 4 of the Sale of Goods Act, 1893 (y).

2. To sell on reasonable credit, where there is no usage to the contrary (z).

3. Where he sells for an undisclosed principal, to receive payment of the price in accordance with the terms of the contract (a).

4. To act in accordance with the usage, rules, and regulations of the market in which he deals, except so far as they are illegal or unreasonable, or alter the intrinsic nature of the contract of agency (b).

5. To close his account with the principal who fails to pay differences; or, in a proper case, to close part only of the account (c).

A broker has no implied authority, as such—

1. To contract in his own name (d).

2. To cancel contracts made by him (e).

3. To pay total or partial losses on behalf of his underwriters (f).

4. To receive payment for an undisclosed principal otherwise than in accordance with the terms of the original contract, or to receive payment by way of set-off (g).

5. To delegate his authority, whether acting under a *del credere* commission or not (h).

6. To pledge bills intrusted to him to get discounted (i), in the absence of a particular custom sanctioning such a pledge (k).

7. To sell stock or shares on credit, even when he considers it for the principal's benefit (l).

8. To receive payment of the price of goods sold by him, when the principal is disclosed (m).

(x) *Gill v. Kymer* (1821), 5 Moore, 503; *Fielding v. Kymer* (1821), 2 B. & B. 639.

(y) 56 & 57 Vict. C. 71; *Purton v. Crofts* (1864), 33 L. J. C. P. 189; 16 C. B. (n.s.) 11; *Thompson v. Gardiner* (1876), 1 C. P. D. 777. See Article 95.

(z) *Boorman v. Brown* (1842), 3 Q. B. 511; (1844), 11 C. & F. 1, H. L.; *Wiltshire v. Sims* (1808), 1 Camp. 258.

(a) *Campbell v. Hassel* (1816), 1 Stark. 233.

(b) See Article 41, Illustrations 1 to 12.

(c) Article 71, Illustration 12.

(d) *Baring v. Corrie* (1818), 2 B. & A. 137.

(e) *Xenos v. Wickham* (1866), L. R. 2 H. L. 296; 36 L. J. C. P. 313, H. L.

(f) *Bell v. Auldjo* (1784), 4 Doug. 48.

(g) *Campbell v. Hassel* (1816), 1 Stark. 233; *Pearson v. Scott* (1878), 9 Ch. D. 198; 47 L. J. Ch. 705; Article 34, Illustrations 7 and 8.

(h) *Henderson v. Barnewell* (1827), 1 Y. & J. 387; *Cockran v. Irlam* (1813), 2 M. & S. 301.

(i) *Haynes v. Foster* (1833), 3 L. J. Ex. 153; 2 C. & M. 237.

(k) *Foster v. Pearson* (1835), 1 C. M. & R. 849; 4 L. J. Ex. 120.

(l) *Wiltshire v. Sims* (1808), 1 Camp. 258.

(m) *Linck v. Jameson* (1886), 2 T. L. R. 206, C. A.

3. Auctioneers.

An auctioneer has implied authority at a sale by auction to sign a contract or memorandum thereof on behalf of both vendor and purchaser, and his signature is a sufficient compliance with the Sale of Goods Act, 1893, s. 4, or of the Law of Property Act, 1925, s. 40, in an action against either party for specific performance or for damages for breach of contract (*n*).

An auctioneer has no implied authority, as such—

1. To rescind a sale (*o*).
2. To warrant goods (*p*).
3. To take a bill of exchange in payment, where it is provided that the price shall be paid to him (*q*).
4. To sign the vendor's name to any contract except the contract of sale (*r*).
5. To sell by private contract, even where the public sale proves abortive and he is offered more than the reserve price (*s*).
6. To deliver goods sold without payment, or to allow a set-off due from the seller to the buyer (*t*).
7. To deal, after sale, with the terms on which a title shall be made (*u*). He is an agent for sale only (*u*).

4. Counsel.

Where counsel is employed to conduct a case, he has implied authority, subject to any express instructions to the contrary (*x*)—

1. To consent to a non-suit (*y*), or to the withdrawal of a juror (*z*).
2. To compromise or abandon the claims of his client, or give an undertaking on his behalf, in respect of all matters within the scope of the suit or matter (*a*), but not in respect of anything beyond the scope thereof (*b*).
3. To enter into an agreement with the counsel on the other side as to the

(*n*) 56 & 57 Vict. c. 71; 15 Geo. 5, c. 20; *Kemys v. Proctor* (1820), 1 Jac. & Walk. 350; *Shellan v. Livius* (1832), 2 C. & J. 411; *Emmerson v. Heelis* (1809), 2 Taunt. 38; *White v. Proctor* (1811), 4 Taunt. 209; *Wallace v. Roe*, [1903] 1 Ir. R. 32.

(*o*) *Nelson v. Aldridge* (1818), 2 Stark. 435.

(*p*) *Payne v. Leconfield* (1882), 51 L. J. Q. B. 642.

(*q*) *Williams v. Evans* (1866), L. R. 1 Q. B. 352; 35 L. J. Q. B. 111; *Sykes v. Giles* (1839), 5 M. & W. 645; 9 L. J. Ex. 106.

(*r*) *Megaw v. Molloy* (1878), L. R. 2 Ir. 530. See also *Van Praagh v. Everidge*, [1903] 1 Ch. 434; 72 L. J. Ch. 260, C. A.

(*s*) *Daniel v. Adams* (1764), Amb. 495; *Marsh v. Jelf* (1862), 3 F. & F. 234. An agent abroad, instructed to buy goods at an auction, has authority to buy by private contract before the auction, at less than the price limited by his instructions, *Stein v. Cope* (1883), Cab. & El. 63.

(*t*) *Brown v. Staton* (1816), 2 Chit. 353.

(*u*) *Seton v. Slade* (1802), 7 Ves. 265, 276.

(*x*) See *Neale v. Gordon-Lennox*, [1902] A. C. 466; 71 L. J. K. B. 939, H. L.; *Lewis v. Lewis* (1890), 45 Ch. D. 281; 59 L. J. Ch. 712; *Shepherd v. Robinson*, [1919] 1 K. B. 474; 88 L. J. K. B. 873.

(*y*) *Lynch v. Coel* (1865), 12 L. T. 548.

(*z*) *Strauss v. Francis* (1866), L. R. 1 Q. B. 379; 35 L. J. Q. B. 133.

(*a*) *Re Wood, Ex p. Wenham* (1872), 21 W. R. 104; *Chambers v. Mason* (1858), 28 L. J. C. P. 10; 5 C. B. (N.S.) 59; *Hargrave v. Hargrave* (1850), 19 L. J. Ch. 261; 12 Beav. 408; *Mathews v. Munster* (1887), 20 Q. B. D. 141; 57 L. J. Q. B. 49, C. A.

(*b*) *Ellender v. Wood* (1888), 4 T. L. R. 680, C. A.

subject-matter of the suit or matter, or as to costs (c), but not as to anything beyond the scope of the suit or matter (d).

4. To consent to an order (e).

5. Generally, to do all other things appertaining to the conduct of the case according to his absolute discretion (f).

Where counsel is instructed to plead a contract of sale, he has authority to sign, in the pleading, a memorandum sufficient to satisfy the Law of Property Act, 1925, s. 40 (g), or the Sale of Goods Act, 1893, s. 4 (h).

5. Solicitors.

A solicitor has implied authority—

1. To receive payment of a debt for which he is instructed to sue (i).

2. To receive the consideration for a deed upon its production duly executed and containing a receipt for such consideration by the person entitled to give a receipt therefor (k).

3. Where he is authorised to conduct an action—

(a) to compromise (l); or refer the subject-matter thereof to arbitration (m);

(b) to abandon the claims of his client, provided that they are within the scope of the action, but not where they are collateral thereto (n);

(c) to enter into an undertaking in reference to the subject-matter thereof (o).

4. Where he is authorised to proceed to satisfaction—

(a) to issue and indorse a writ of *fi. fa.*, and do all other acts necessary to obtain the fruits of the judgment (p);

(b) to order the sheriff to withdraw from possession under a writ of *fi. fa.* (q); but his managing clerk has no such implied authority,

(c) *Strauss v. Francis* (1866), L. R. 1 Q. B. 379; 35 L. J. Q. B. 133; *Swinfen v. Swinfen* (1858), 27 L. J. Ch. 35; 2 De G. & J. 381; *Re West Devon Mine* (1888), 38 Ch. D. 51; 57 L. J. Ch. 850, C. A.

(d) *Kempshall v. Holland* (1895), 14 R. 336, C. A.

(e) *Mole v. Smith* (1820), 1 Jac. & Walk. 673; *Re Hobler* (1844), 8 Beav. 101; *Furnival v. Bogle* (1827), 4 Russ. 142.

(f) *Strauss v. Francis*, *supra*; *Lynch v. Coel* (1865), 12 L. T. 548.

(g) 15 Geo. 5, c. 20; *Grindell v. Bass*, [1920] 2 Ch. 487; 89 L. J. Ch. 591.

(h) 56 & 57 Vict. c. 71; *Farr, Smith & Co. v. Messers*, [1928] 1 K. B. 387; 97 L. J. K. B. 126.

(i) *Yates v. Freckleton* (1781), 2 Doug. 623. The authority extends to the solicitor's London agent who issues and indorses the writ: *Weary v. Alderson* (1837), 2 M. & Rob. 127.

(k) Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 69; Trustee Act, 1925 (15 Geo. 5, c. 19), s. 23, extending the principle to solicitors of trustees.

(l) *Butler v. Knight* (1867), L. R. 2 Ex. 109; 36 L. J. Ex. 66; *Prestwich v. Poley* (1865), 34 L. J. C. P. 189; 18 C. B. (N.S.) 806; *Chown v. Parrott* (1863), 32 L. J. C. P. 197; 14 C. B. (N.S.) 74; *Re Newcn*, [1903] 1 Ch. 812; 72 L. J. Ch. 356; *Welsh v. Roe* (1918), 87 L. J. K. B. 520. See also *Little v. Spreadbury*, [1910] 2 K. B. 658; 79 L. J. K. B. 1119 (client's conduct inducing solicitor to believe he had authority). Comp. *Re A Debtor*, [1914] 2 K. B. 758; 83 L. J. K. B. 1176 (compromise after judgment held not binding).

(m) *Faviell v. Eastern Counties Ry.* (1848), 2 Ex. 344; 17 L. J. Ex. 297; 76 R. R. 615; *Smith v. Troup* (1849), 7 C. B. 757; 18 L. J. C. P. 209.

(n) *Re Wood, Ex p. Wenham* (1872), 21 W. R. 104.

(o) *Re Commonwealth Land, etc. Co., Ex p. Hollington* (1873), 43 L. J. Ch. 99.

(p) *Jarman v. Hooper* (1843), 1 D. & L. 769; 64 R. R. 861; *Morris v. Salberg* (1889), 22 Q. B. D. 614, C. A.

(q) *Levi v. Abbott* (1849), 4 Ex. 588; 19 L. J. Ex. 62.

though left in charge of the office and business during the temporary absence of his employer (r);

(c) to compromise, after judgment (s).

A solicitor has no implied authority, as such—

1. To interplead or agree to postpone execution after a judgment in his client's favour, he being then *functus officio*, unless authorised to proceed (t).

2. To direct the sheriff to seize particular goods, when issuing a writ of *fi. fa.*, or otherwise to interfere with the sheriff in the performance of his duties (u).

3. To institute any action or suit (x).

4. To compromise a claim on behalf of his client before an action has been commenced in respect thereof (y).

5. To sign a memorandum of a contract of which he is instructed to prepare a draft, so as to satisfy the provisions of the Law of Property Act, 1925 (z).

6. To receive the purchase-money for property sold (except on production of a deed, as above (a)).

7. To receive payment of a mortgage debt, though authorised to receive payment of the interest and permitted to have possession of the mortgage deed (b).

8. To take a cheque in lieu of cash in payment of a mortgage debt, of which he is authorised to receive payment (c).

9. To pledge the credit of his client to counsel for fees (d).

10. To take special journeys, or go to foreign parts, on his client's behalf (e).

6. Shipmasters.

The extent of a shipmaster's authority to sell or hypothecate the ship, cargo, or freight, or to bind his principals personally by contract, is determined by the law of the country to which the ship belongs, and the ship's flag operates as notice to all the world that the master's authority is limited by

(r) *Whyte v. Nutting*, [1897] 2 Ir. R. 241.

(s) *Butler v. Knight* (1867), L. R. 2 Ex. 109; 36 L. J. Ex. 66. *Comp. Re A Debtor*, [1914] 2 K. B. 758; 83 L. J. K. B. 1176; note (l), p. 63, *ante*.

(t) *James v. Ricknell* (1887), 20 Q. B. D. 164; 57 L. J. Q. B. 113; *Lovegrove v. White* (1871), L. R. 6 C. P. 550; 40 L. J. C. P. 253. But see *Sandford v. Porter*, [1912] 2 Ir. R. 551.

(u) *Smith v. Keal* (1882), 9 Q. B. D. 340, C. A.

(x) *Wright v. Castle* (1817), 3 Meriv. 12; *Atkinson v. Abbott* (1855), 3 Drew. 251.

(y) *Macaulay v. Polley*, [1897] 2 Q. B. 122; 66 L. J. Q. B. 665, C. A.

(z) 15 & 16 Geo. 5, c. 20, s. 40; *Howard v. Braithwaite* (1812), 1 Ves. & B. 202; *Smith v. Webster* (1876), 3 Ch. D. 49; 45 L. J. Ch. 528, C. A. But see *Griffiths Cycle Corpn. v. Humber*, [1899] 2 Q. B. 414; 68 L. J. Q. B. 959, C. A.; *North v. Loomes*, [1910] 1 Ch. 378; 88 L. J. Ch. 217; *Horner v. Walker*, [1923] 2 Ch. 218; 92 L. J. Ch. 573.

(a) P. 63, *ante*; *Viney v. Chaplin* (1858), 27 L. J. Ch. 434; 2 De G. & J. 468; 119 R. R. 213; *Ex p. Swinbanks, Re Shanks* (1879), 11 Ch. D. 525; 48 L. J. Ch. 120, C. A.

(b) *Wilkinson v. Candlish* (1850), 5 Ex. 91; 19 L. J. Ex. 166; 82 R. R. 588; *Kent v. Thomas* (1856), 1 H. & N. 473.

(c) *Blumberg v. Life Interests, etc., Corpn.*, [1897] 1 Ch. 171; [1898] 1 Ch. 27; 66 L. J. Ch. 127; 67 *ib.* 118, C. A.

(d) *Mostyn v. Mostyn, Ex p. Barry* (1870), L. R. 5 Ch. 457; 39 L. J. Ch. 780.

(e) *Re Snell* (1877), 5 Ch. D. 815, C. A.; *Re Price* (1845), 9 Beav. 234; *Re Bevan* (1855), 20 Beav. 146.

the law of that flag (*f*). Thus, if an English cargo be hypothecated by the master of an Italian ship, the validity of the bond is governed by Italian law, and if found to be valid by that law, it will be enforced by the English Courts, although the conditions required for its validity by English law were not fulfilled (*g*).

A shipmaster is appointed for the purpose of conducting the voyage on which the ship is engaged to a favourable termination, and has implied authority to do all things necessary for the due and proper prosecution of that voyage (*h*). He has also implied authority to enter into contracts in respect of the usual employment of the ship (*i*). But he can only bind personally those persons who appointed him or were privy to his appointment (*k*). The mere fact that a person is a registered owner of the vessel is not sufficient to render him liable on the master's contracts; it must appear that the master is, or has been held out as, his agent (*k*). Thus, if the ship be chartered, and the possession and control thereof given up to the charterers, who appoint the master, the owners are not liable on a bill of lading or other contract entered into by the master (*l*). The same principle applies if the vessel be chartered, and the possession and control given up, to the master himself (*m*).

The master of a British ship has implied authority—

1. To contract for the conveyance of merchandise according to the usual employment of the ship (*n*).

2. To enter into a charterparty on behalf of the owners, when he is in a foreign port and there is difficulty in communicating with the owners (*o*).

3. To render salvage services to vessels in distress (*p*).

4. To enter into reasonable towage agreements (*q*).

5. To enter into reasonable salvage agreements, if necessary for the owners' benefit; but not merely for the purpose of saving the lives of the master and

(*f*) *The Karnak* (1869), L. R. 2 P. C. 505; 38 L. J. Ad. 57, P. C.; *The August*, [1891] P. 328; 60 L. J. P. 57; *Lloyd v. Guibert* (1865), 33 L. J. Q. B. 241; 6 B. & S. 100, 120, Ex. Ch.

(*g*) *The Gaelano and Maria* (1882), 7 P. D. 137; 51 L. J. Ad. 67, C. A.

(*h*) *Arthur v. Barton* (1840), 6 M. & W. 138; *Beldon v. Campbell* (1851), 6 Ex. 886. It is doubtful whether he has implied authority to make an agreement binding his owners to arbitration; see *The City of Calcutta* (1899), 79 L. T. 517, C. A., where an application to stay an action, under the Arbitration Act, 1889, s. 4, was refused because of such doubtfulness.

(*i*) *Grant v. Norway* (1851), 20 L. J. C. P. 93; 10 C. B. 665; 84 R. R. 747; *McLean v. Fleming* (1871), 2 H. L. Sc. App. 128.

(*k*) *Mackenzie v. Pooley* (1856), 11 Ex. 638; 25 L. J. Ex. 124; 105 R. R. 698; *Mitcheson v. Oliver* (1855), 5 E. & B. 419, Ex. Ch.; *Myers v. Willis* (1856), 25 L. J. C. P. 255; 18 C. B. 886; *Baker v. Buckle* (1822), 7 Moo. 349. As to holding out, see Article 10, Illustration 4.

(*l*) *Baumvool Manufactur v. Furness*, [1893] A. C. 8; 62 L. J. Q. B. 201, H. L.

(*m*) *Frazer v. Marsh* (1811), 13 East, 238; *Keeve v. Davis* (1834), 1 A. & E. 312; *Colvin v. Newberry* (1832), 1 C. & F. 283. *Comp. Steel v. Lester* (1877), 3 C. P. D. 121; 47 L. J. C. P. 43; *Associated Portland Cement Manufrs. v. Ashton*, [1915] 2 K. B. 1; 84 L. J. K. B. 519, C. A.

(*n*) *Runquist v. Ditchell* (1801), 3 Esp. 64.

(*o*) *The Fanny, The Mathildu* (1883), 5 Asp. M. C. 75; *Grant v. Norway* (1851), 10 C. B. 665; 20 L. J. C. P. 93.

(*p*) *The Thetis* (1809), L. R. 2 Ad. 365; 38 L. J. Ad. 42.

(*q*) *Wellfield v. Adamson (The Alfred)* (1884), 5 Asp. M. C. 214; *The Arthur* (1802), 6 L. T. 556.

crew without regard to saving the owners' property. A salvage agreement operates as a charge on the property saved, and is only binding to the extent of the value of that property (*r*).

6. To pledge his principals' credit, at home or abroad, for fit and proper repairs and stores necessary for the equipment of the vessel on her voyage, such as a prudent owner himself would order (*s*), provided that it is reasonably necessary to obtain them on the principals' credit (*t*).

7. To borrow money on his principals' credit, at home or abroad, when the advance is necessary for the prosecution of the voyage, communication with the principals is not practicable, and they have no solvent agent on the spot (*u*). To render the principals liable for such an advance, the lender must prove—(1) that there was a reasonable necessity, according to the ordinary course of prudent conduct to borrow on their credit (*x*) (this is a question of fact (*u*)); (2) that the amount was advanced expressly for the use of the ship (*y*); and (3) that the money was expended on the ship (*z*). There is no implied authority to pledge the credit of the principals when it is reasonably practicable to communicate with them (*u*), or when there is a solvent agent on the spot (*t*). Nor is there implied authority to pledge their credit for services already rendered (*u*). The state of accounts between the master and his principals does not affect his implied authority to borrow on their credit (*a*).

8. To hypothecate the ship, cargo, and freight (bottomry) when communication with the respective owners is impracticable (*b*), and it is necessary to obtain supplies or repairs in order to prosecute the voyage, and impossible to obtain them on personal credit, or in any other way than by hypothecation (*c*). But there is no implied authority to hypothecate either ship or cargo for necessities already supplied (*c*), or for the purpose of obtaining personal freedom from arrest (*d*), or where it is possible to obtain supplies in any other way (*c*). Where ship and cargo are hypothecated for repairs, the

(*r*) *The Renpor* (1883), 8 P. D. 115; 52 L. J. P. 49; *The Mariposa*, [1896] P. 273; 65 L. J. P. 104; *The Inchmaree*, [1899] P. 111; 68 L. J. P. 30. The Court will not enforce unreasonable or inequitable contracts for salvage or towage services: *The Medina* (1876), 2 P. D. 5, C. A.; *The Silesia* (1880), 5 P. D. 177; *The Crusader*, [1907] P. 196, C. A.

(*s*) *Frost v. Oliver* (1853), 22 L. J. Q. B. 353; 1 C. L. R. 1003; *Webster v. Seekamp* (1821), 4 B. & A. 352; *The Riga* (1872), L. R. 3 Ad. 516; 41 L. J. Ad. 39.

(*t*) *Gunn v. Roberts* (1874), L. R. 9 C. P. 331; 43 L. J. C. P. 233; *Edwards v. Havill* (1853), 23 L. J. C. P. 8; 14 C. B. 107; *Mackintosh v. Mitcheson* (1849), 4 Ex. 175; 18 L. J. Ex. 385; 80 R. R. 513; *Pocahontas Fuel Co. v. Ambatielos* (1922), 27 Com. Cas. 148.

(*u*) *Arthur v. Barton* (1840), 6 M. & W. 138; *Beldon v. Campbell* (1851), 6 Ex. 886; *Stonehouse v. Gent* (1841), 2 Q. B. 431; *Johns v. Simons* (1842), 2 Q. B. 425; *Edwards v. Havill* (1853), 14 C. B. 107; *Rocher v. Busher* (1815), 1 Stark. 27; *Robinson v. Lyall* (1819), 7 Price, 592.

(*x*) See note (*t*), *supra*.

(*y*) *Bogle v. Atty* (1818), Gow, 50.

(*a*) *Williamson v. Page* (1844), 1 C. & K. 581.

(*b*) *Kleinwort v. Cassa Marittima Genoa* (1877), 2 App. Cas. 156, P. C.; *The Staffordshire* (1872), L. R. 4 P. C. 194; 41 L. J. Ad. 49, P. C.; *The Panama* (1870), L. R. 3 P. C. 199; 39 L. J. Ad. 37; *The Olivier* (1862), 31 L. J. Ad. 137.

(*c*) *The Hersey* (1837), 3 Hagg. Ad. 404; *Hussey v. Christie* (1807), 13 Ves. 599; *The Ida* (1872), L. R. 3 Ad. 542; *Lyall v. Hicks* (1859), 27 Beav. 616; *The Faithful* (1862), 31 L. J. Ad. 81; *Soares v. Rahn* (1838), 3 Moo. P. C. C. 1, P. C.; *Heathorn v. Darling* (1836), 1 Moo. P. C. 5; *Stainbank v. Shepard* (1853), 22 L. J. Ex. 341; 13 C. B. 418, Ex. Ch.

(*d*) *Smith v. Gould* (1842), 4 Moo. P. C. C. 21, P. C.

shipowners are bound to indemnify the owners of the cargo from liability under the bond (e).

9. To hypothecate the cargo alone (*respondentia*), when it is necessary for the benefit of the cargo or for the prosecution of the voyage (f), and communication with the owners is impracticable (g). The master has no implied authority to hypothecate or do any act seriously affecting the value of the cargo without first communicating, if practicable, with the owners thereof (g).

10. To sell the ship, in cases of urgent necessity, when it is not practicable to communicate with the owners (h). The burden of proving necessity lies on the party seeking to uphold the sale (i). It must be such a stringent necessity as leaves the master no alternative as a prudent and skilful man, acting in good faith for the best interests of all concerned, and with the best judgment that can be formed in the circumstances, except to sell the ship as she lies. If he sell hastily, either without sufficient examination into the condition of the ship, or without having previously made every exertion in his power with the means then at his disposal to extricate her, the sale is invalid, even if the danger at the time appeared exceedingly imminent (k). But where in consequence of damage it is impossible to prosecute the voyage, or there is no prospect of completing it (l), or where the ship is in a foreign port, and cannot be repaired except at such a cost as no prudent person would venture to incur, the master has implied authority to sell her (m).

11. To sell part of the cargo—but not the whole—where repairs are absolutely necessary for the prosecution of the voyage, and communication with the owners of the cargo is impracticable (n). But it is only in cases of extreme necessity, and only after he has done everything in his power to carry the cargo to its destination, that he has implied authority to sell any portion of it (o). He has no implied authority, in any case, to stop the

(e) *Duncan v. Benson*, 1 Ex. 537; 74 R. R. 754. Affirmed *sub nom. Benson v. Duncan* (1849), 3 Ex. 644; 18 L. J. Ex. 169, Ex. Ch.

(f) *The Sultan* (1859), Swa. 504; *The Gratitude* (1801), 3 Rob. 240.

(g) *The Onward* (1873), L. R. 4 Ad. 38; 42 L. J. Ad. 61; *The Hamburg* (1863), 33 L. J. Ad. 116; 2 Moo. P. C. C. (N.S.) 289, P. C.

(h) *The Australia* (1859), 13 Moo. P. C. C. 132, P. C.; *The Margaret Mitchell* (1858), Swa. 382.

(i) *Cobequid Marine Ins. Co. v. Barteaux* (1875), L. R. 6 P. C. 319; *Knight v. Faith* (1850), 15 Q. B. 649; 19 L. J. Q. B. 509. Held necessary in *The Glasgow* (1856), Swa. 145; *The Victor* (1865) 13 L. T. 21; *The Australia* (1859), 13 Moo. P. C. C. 132, P. C.; *Ireland v. Thomson* (1847), 4 C. B. 149; 17 L. J. C. P. 241; *Robertson v. Clarke* (1824), 1 Bing. 445. Sale set aside as unnecessary in *The Bonita*, *The Charlotte* (1861), 30 L. J. Ad. 145; *The Eliza Cornish*, or *The Segredo* (1853), 1 Spinks 36.

(k) *Cobequid Marine Ins. Co. v. Barteaux* (1875), L. R. 6 P. C. 319.

(l) *Ireland v. Thomson* (1847), 17 L. J. C. P. 241; 4 C. B. 149; *Hunter v. Parker* (1840), 7 M. & W. 322.

(m) *The Australia* (1859), 13 Moo. P. C. C. 132, P. C.; *Idle v. Royal Exchange Ass. Co.* (1819), 3 Moo. 115.

(n) *The Gratitude* (1801), 3 Rob. 240; *Australasian S. N. Co. v. Morse* (1872), L. R. 4 P. C. 222, P. C.; *Duncan v. Benson*, *supra*.

(o) *Atlantic Mutual Ins. Co. v. Huth* (1879), 16 Ch. D. 474, C. A.; *Wilson v. Millar* (1816), 2 Stark. 1; *Joseph v. Knox* (1813), 3 Camp. 320; *Van Omeron v. Dowick* (1809), 2 Camp. 42; *Cannan v. Meaburn* (1823), 1 Bing. 243; *Acatos v. Burns* (1878), 3 Ex. D. 282; 47 L. J. Ex. 566, C. A.

voyage and sell the whole of the cargo in a foreign port, even when it is impossible to prosecute the original voyage and the sale is most beneficial for the owners in the circumstances (o). The authority of the master as an agent of the owners of the cargo is strictly an authority of necessity (p).

The master of a British ship has no implied authority—

1. To vary any contract made by the owners (q).
2. To agree for the substitution of another voyage in place of that agreed upon between the owners and freighters, or make any contract outside the scope of that voyage (r).
3. To hold out any person as an agent to charter the vessel (s).
4. To sign a bill of lading at a lower freight than the owner contracted for (t), or making the freight payable to any other person than the owner (u).
5. To sign a bill of lading for goods not actually received (x), or for a greater quantity than are actually received, on board (y). His authority is limited to signing for goods actually received on board, and all persons taking a bill of lading, by indorsement or otherwise, are deemed to have notice that his authority is so limited (z). The Bills of Lading Act, 1855 (a), s. 3—providing that every bill of lading, in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment against the master or other person signing the same, notwithstanding such goods or part thereof may not have been shipped, etc.—applies only as against the persons who have actually signed the bill of lading (b), and does not make the master's signature conclusive evidence against the owners (c). The master's signature is *prima facie* evidence against the owners that the goods were put on board (d); but they are permitted to prove that in fact they were not (e), unless there is an agreement that the bill of lading shall be conclusive against the owners as to the quantity shipped (e).

(o) See previous page.

(p) *Gibbs v. Grey* (1857), 26 L. J. Ex. 286; 2 H. & N. 22; *Freeman v. E. I. Co.* (1822), 5 B. & A. 617.

(q) *Grant v. Norway* (1851), 10 C. B. 665; 20 L. J. C. P. 93; *Pearson v. Göschen* (1864), 33 L. J. C. P. 205; 17 C. B. (n.s.) 352.

(r) *Burgon v. Sharpe* (1810), 2 Camp. 529.

(s) *The Fanny, The Mathilda* (1883), 5 Asp. M. C. 75.

(t) *Pickernell v. Auberry* (1862), 3 F. & F. 217.

(u) *Reynolds v. Jex* (1865), 34 L. J. Q. B. 241; 7 B. & S. 86.

(x) *Grant v. Norway, supra*; *Cox v. Bruce* (1886), 18 Q. B. D. 147; 56 L. J. Q. B. 121, C. A. Comp. *British Columbia, etc., Co. v. Nettleship* (1868), L. R. 3 C. P. 499; 37 L. J. C. P. 235.

(y) *Hubbersty v. Ward* (1853), 8 Ex. 330; 22 L. J. Ex. 113; *Thorman v. Burt* (1886), 54 L. T. 349, C. A.

(z) See previous note.

(a) 18 & 19 Vict. c. 111.

(b) *Jessel v. Bath* (1867), L. R. 2 Ex. 267; 36 L. J. Ex. 149.

(c) *Meyer v. Dresser* (1864), 33 L. J. C. P. 289; 16 C. B. (n.s.) 646; *Brown v. Powell Duffryn Coal Co.* (1875), L. R. 10 C. P. 562; 44 L. J. C. P. 289.

(d) *M'Lean v. Fleming* (1871), 2 H. L. Sc. App. 129, H. L.; *Smith v. Bedouin S. N. Co.*, [1896] A. C. 70; 65 L. J. P. C. 8, H. L. Sc.; *Bennett v. Bacon* (1897), 13 T. L. R. 204.

(e) *Lishman v. Christie* (1887), 19 Q. B. D. 333; 56 L. J. Q. B. 538, C. A.; *Crossfield v. Kyle Shipping Co.*, [1916] 2 K. B. 885; 85 L. J. K. B. 1310, C. A.

CHAPTER VII.

DELEGATION.

Article 42.

WHEN AGENT MAY DELEGATE HIS AUTHORITY.

No agent has power to delegate his authority, or to appoint a sub-agent to do any act on behalf of the principal, except with the express or implied authority of the principal. The authority of the principal is implied in the following cases:—

- (1) Where the employment of a sub-agent is justified by the usage of the particular trade or business in which the agent is employed, provided that such usage is not unreasonable, nor inconsistent with the express terms of the agent's authority or instructions (*a*).
- (2) Where the principal knows, at the time of the agent's appointment, that the agent intends to delegate his authority (*b*).
- (3) Where, from the conduct of the principal and agent, it may reasonably be presumed to have been their intention that the agent should have power to delegate his authority (*c*).
- (4) Where, in the course of the agent's employment, unforeseen emergencies arise which render it necessary for the agent to delegate his authority (*c*).
- (5) Where the authority conferred is of such a nature as to necessitate its execution wholly or in part by means of a deputy or sub-agent (*d*).
- (6) Where the act done is purely ministerial, and does not involve confidence or discretion (*e*).

The maxim "*Delegatus non potest delegare*" is founded on the confidential character of the contract of agency, and whenever authority is coupled with a discretion or confidence, it must, as a general rule, be executed by the

(*a*) *De Bussche v. Alt* (1877), 8 Ch. D. 286; 47 L. J. Ch. 381, C. A.; Illustration 6.

(*b*) *Quebec, etc., Ry. v. Quinn* (1858), 12 Moo. P. C. C. 232, P. C.; *Dew v. Met. Ry.* (1885), 1 T. L. R. 358; Illustration 6.

(*c*) *De Bussche v. Alt*, *supra*; *Gwilliam v. Twist*, [1895] 2 Q. B. 84; 64 L. J. Q. B. 474, C. A.; *Harris v. Fiat Motors* (1906), 22 T. L. R. 556; *Tarn v. Scanlan*, [1928] A. C. 35; 97 L. J. K. B. 267.

(*d*) See note (*b*), above.

(*e*) Illustrations 4 and 5; *Mason v. Joseph* (1804), 1 Smith 406; *Rossiter v. Trafalgar Life Ass. Co.* (1859), 27 Beav. 377; *St. Margaret's Burial Board v. Thompson* (1871), L. R. 6 C. P. 445; 40 L. J. C. P. 213; *Hemming v. Hale* (1859), 29 L. J. C. P. 137; 7 C. B. (N.S.) 487.

agent in person (*f*). Thus, auctioneers (*g*), factors (*h*), directors (*i*), liquidators (*k*), brokers (*l*), etc., have in general, no implied authority to employ deputies or sub-agents.

Illustrations.

1. A shipmaster was authorised to sell certain goods. Held, that he had no implied authority to send them on to another person for sale, though he was unable himself to find a purchaser (*m*).

2. A board constituted by statute was authorised to delegate its powers to a committee. Held, that the committee must exercise in concert the powers delegated to them, and could not apportion them amongst themselves (*n*).

3. The directors of a company were given power to purchase the company's own shares, and also to appoint a general manager. Held, that the power to purchase shares could not be delegated by the directors to the general manager (*o*). Directors of companies governed by the Companies Clauses Consolidation Act, 1845 (*p*), or by the provisions of Table A of the Companies Act, 1929, may, however, delegate their authority to committees consisting of one or more of themselves.

4. An agent buys property at a sale by auction, and the auctioneer enters his name as buyer without objection by the principal, who is present at the sale. The entry is a sufficient memorandum of the contract as against the principal (*q*). But where a tenant for life had a power to lease, and a memorandum of a contract for a lease was signed by his agent's clerk with the approval of the agent and in the ordinary course of business, it was held that the memorandum was not sufficient to satisfy the Statute of Frauds, not having been signed by a duly authorised agent within the meaning of that statute (*r*).

5. An agent has authority to draw bills of exchange in the principal's name. The authority may be exercised through the agent's clerk (*s*). So, an authority given to an agent to indorse a particular bill in the principal's name may be delegated, because such acts are purely ministerial and involve no discretion (*s*). So, it was held that though four liquidators had no power to authorise one of their number to accept bills of exchange on behalf of them

(*f*) *Combe's Case*, 9 Co. Rep. 75 (vol. 5, p. 135); *Blore v. Sutton* (1816), 3 Meriv. 237; 17 R. R. 74; *Symonds v. Kurtz* (1889), 61 L. T. 559.

(*g*) *Coles v. Trecothick* (1804), 9 Ves. 234.

(*h*) *Cockran v. Irlam* (1813), 2 M. & S. 301; *Catlin v. Bell* (1815), 4 Camp. 183; *Solly v. Rathbone* (1814), 2 M. & S. 298.

(*i*) *Re Leeds Banking Co., Howard's Case* (1866), L. R. 1 Ch. 561; 36 L. J. Ch. 42.

(*k*) *Ex p. Birmingham Banking Co.* (1868), L. R. 3 Ch. 631.

(*l*) *Henderson v. Barnewell* (1827), 1 Y. & J. 387; *Cockran v. Irlam* (1813), 2 M. & S. 301.

(*m*) *Catlin v. Bell* (1815), 4 Camp. 183.

(*n*) *Cook v. Ward* (1877), 2 C. P. D. 255, C. A.; but see *Agnew v. Manchester Corporation* (1902), 67 J. P. 174; 1 L. G. R. 9.

(*o*) *Cartmell's Case* (1874), L. R. 9 Ch. 691; 43 L. J. Ch. 588.

(*p*) 8 & 9 Vict. c. 16.

(*q*) *White v. Proctor* (1811), 4 Taunt. 209; *Coles v. Trecothick* (1804), 9 Ves. 234.

(*r*) *Blore v. Sutton* (1816), 3 Meriv. 237; 17 R. R. 74. And see *Doe d. Rhodes v. Robinson* (1837), 6 L. J. C. P. 235; 3 Bing. N. C. 677.

(*s*) *Ex p. Sutton* (1788), 2 Cox 84; *Lord v. Hall* (1848), 2 C. & K. 698. See also *Kenworthy v. Schofield* (1824), 2 B. & C. 945; *White v. Proctor* (1811), 4 Taunt. 209; *Brown v. Tombs*, [1891] 1 Q. B. 253; 60 L. J. Q. B. 38.

all, they might authorise him to accept a particular bill on their behalf, because the execution of the former authority would involve discretion, whereas the latter was an authority to do a purely ministerial act (t).

6. *Solicitors' town agents*.—A country solicitor has implied authority to act through his London agent when necessary or usual in the ordinary course of business, and the acts of such agent in reference to the matters intrusted to him bind the client (u). Where a London agent has the general conduct of an action, he has the same general authority in conducting it, including authority to compromise, as the country solicitor employing him, in the absence of any express limits on such general authority (x). But a solicitor cannot delegate his entire employment to his London agent so as to make the agent his client's solicitor (y).

Article 43.

RELATIONS BETWEEN PRINCIPAL AND SUB-AGENT.

There is no privity of contract between a principal and sub-agent, as such, whether the sub-agent was appointed with the authority of the principal or not; and the rights and duties arising out of the contracts between the principal and agent, and between the agent and sub-agent, respectively, are only enforceable by and against the immediate parties thereto (z). Provided, that the relation of principal and agent may be established by an agent between his principal and a third person, if the agent be expressly or impliedly authorised to constitute such relation, and it is the intention of the agent and of such third person that such relation should be constituted (a).

Where a sub-agent is appointed without the authority, express or implied, of the principal, the principal is not bound by his acts (b).

Illustrations.

1. A ship was consigned to A, an agent in China, for sale, a minimum price being fixed. A, with the knowledge and consent of the principal, employed B to sell the ship. B, being unable to find a purchaser, bought the ship himself at the minimum price, and subsequently resold her at a large profit. It was held that privity of contract existed between the principal

(t) *Ex p. Birmingham Banking Co.* (1868), L. R. 3 Ch. 651.

(u) *Griffiths v. Williams* (1787), 1 T. R. 710; *Weary v. Alderson* (1837), 2 M. & Rob. 127; *Solley v. Wood* (1852), 16 Beav. 370. See Article 43, Illustrations 8 and 9.

(x) *Re Newen*, [1903] 1 Ch. 812; 72 L. J. Ch. 356.

(y) *Wray v. Kemp* (1883), 26 Ch. D. 169; 53 L. J. Ch. 1020. See also *Re Beckett*, [1918] 2 Ch. 72; 87 L. J. Ch. 457.

(z) *Calico Printers' Association v. Barclays Bank* (1931), 145 L. T. 51, C. A.; *New Zealand and Australian Land Co. v. Watson* (1881), 7 Q. B. D. 374; 50 L. J. Q. B. 433, C. A.; *Robbins v. Fennell* (1847), 11 Q. B. 248; 17 L. J. Q. B. 77; *Schmaling v. Tomlinson* (1815), 6 Taunt. 147; *Scott v. Crawford* (1842), 4 M. & G. 1031; *Hannaford v. Syme* (1898), 79 L. T. 30; Illustrations 2 to 9.

(a) Illustration 1.

(b) See *Doe d. Rhodes v. Robinson* (1837), 3 Bing. N. C. 677; *Blore v. Sutton* (1816), 3 Meriv. 237; *Wray v. Kemp* (1883), 26 Ch. D. 169; 53 L. J. Ch. 1020. Illustrations 6 and 7.

and B, and that B was liable to account to the principal for the profit made on the re-sale (c).

2. A factor was employed to sell goods on a *del credere* commission. The factor, with the principal's authority, employed a broker on an ordinary commission to sell the goods. The broker sold the goods and received the proceeds, and made payments on account to the factor from time to time. While the balance of the proceeds was still in the hands of the broker, the factor, being then indebted to the broker in respect of other independent transactions, became bankrupt. Held—(1) that there was no privity of contract between the principal and the broker; (2) that the broker was not liable to account to the principal for the proceeds of the goods sold; (3) that the principal was not entitled to recover the balance of the proceeds from the broker in the factor's name without allowing the amount due from the factor to the broker in respect of other transactions to be set off, though the broker had reason to believe that the factor was acting as an agent (d).

3. An agent appointed a sub-agent to manage the principal's affairs. The sub-agent took over the entire management thereof, and communicated with the principal direct. Held, that the sub-agent was not liable to render an account of his agency to the principal (e). The rule is that sub-agents must account to the agents employing them, and the agents to their principals (f). An agent is only liable to account to his own principal (g).

4. A employs B to transport goods to a foreign market. B, without A's knowledge or consent, delegates his entire employment to C. There is no privity of contract between A and C, and A is not liable to C for his charges, even if he has not paid B for the services rendered (h).

5. A employs B to procure a loan on usual terms. B employs C, who obtains a loan on terms which are unusual. A is not liable to C for commission, unless he ratifies the terms of the loan and recognises C as his agent (i).

6. A factor delegates his employment without the authority of the principal. The sub-agent has no lien for duties, etc., paid by him, as against the principal (k).

7. A authorises B, a shipbroker, to receive payment of freight. B cannot delegate the authority, and A is not bound by the payment of the freight to the sub-agent (l).

(c) *De Bussche v. Alt* (1877), 8 Ch. D. 286; 47 L. J. Ch. 381, C. A.; *Powell v. Jones*, [1905] 1 K. B. 11; 74 L. J. K. B. 115, C. A.

(d) *New Zealand and Australian Land Co. v. Watson* (1881), 7 Q. B. D. 374; 50 L. J. Q. B. 433, C. A. See however *Blackburn v. Mason* (1893), 68 L. T. 510, C. A.

(e) *Lockwood v. Abdy* (1845), 14 Sim. 437. And see *Cartwright v. Haleley* (1791), 1 Ves. jun. 292.

(f) *Stephens v. Badcock* (1832), 1 L. J. K. B. 75; 3 B. & Ad. 354; *Sims v. Britain* (1832), 1 N. & M. 594; *Montagu v. Forwood*, [1893] 2 Q. B. 350, C. A.

(g) *Att.-Gen. v. Chesterfield* (1854), 18 Beav. 596; *Pinto v. Santos* (1814), 1 Marsh. 132; *Maw v. Pearson* (1860), 28 Beav. 196.

(h) *Schmaling v. Tomlinson* (1815), 6 Taunt. 147.

(i) *Mason v. Clifton* (1863), 3 F. & F. 899.

(k) *Solly v. Rathbone* (1814), 2 M. & S. 298.

(l) *Dunlop v. De Murrieta* (1886), 3 T. L. R. 166, C. A.

Solicitors' town agents.

8. The London agent of a country solicitor, in the ordinary course receives, as such, the proceeds of a cause in which he is engaged. There is no privity of contract between the client and the London agent, and the client cannot recover the proceeds from him as money received to the client's use (*m*). So, a London agent, in the ordinary course, gives credit to the country solicitor and not to the client, and has no remedy, except his lien, against the client for costs, and such lien, as against the client, is limited to the amount due from the client to the country solicitor (*n*). The Court may, however, in exercise of its summary jurisdiction over its own officers, order a London agent to pay over to the client money received, the agent claiming to retain the amount in satisfaction of a debt due to him from the country solicitor (*o*), or having received it without the authority of either the country solicitor or the client (*p*).

9. A client gives money to his solicitor to pay a debt and costs. The solicitor remits the amount, by means of his own cheque, to his London agent for the purpose of paying such debt and costs. The agent retains the amount in satisfaction of a debt due to him from the solicitor. The agent is not liable to the client in an action for money had and received to the client's use (*q*). So, if a London agent receive money improperly, the remedy of the client is against his own solicitor, not against the agent (*r*).

(*n*) *Robbins v. Fennell* (1847), 11 Q. B. 248; 17 L. J. Q. B. 77; 75 R. R. 363. And see *Hannaford v. Syme* (1898), 79 L. T. 30.

(*o*) *Ex p. Edwards, re Johnson* (1881), 7 Q. B. D. 155; 8 Q. B. D. 262; 51 L. J. Q. B. 108 C. A.; *Waller v. Holmes* (1860), 30 L. J. Ch. 24; 1 Johns. & H. 239; *Farewell v. Coker* (1728), 2 P. W. 460.

(*p*) *Ex p. Edwards, supra*; *Hanley v. Cassan* (1847), 11 Jur. 1088.

(*q*) *Robbins v. Fennell, supra*; *Robbins v. Heath* (1848), 11 Q. B. 257, n.

(*r*) *Cobb v. Becke* (1845), 6 Q. B. 930; 14 L. J. Q. B. 108. See, however, *Ex p. Edwards, supra*.

(*i*) *Gray v. Kirby* (1834), 2 Dowl. 601. See, however, *Robbins v. Fennell, supra*; *Robbins v. Heath, supra*.

CHAPTER VIII.

DUTIES OF AGENTS.

Article 44.

DUTY TO PERFORM HIS UNDERTAKING.

EVERY agent who enters into an undertaking for valuable consideration is bound to perform the undertaking (*a*); but no agent is liable for the mere non-performance of that which he has undertaken to do gratuitously (*b*). Every agent must act in person, unless he is expressly or impliedly authorised by the principal to delegate his duties (*c*).

Article 45.

DUTY TO OBEY INSTRUCTIONS, OR ACT ACCORDING TO USAGE
AND FOR THE PRINCIPAL'S BENEFIT.

It is the duty of every agent strictly to pursue the terms of his authority and obey the lawful instructions of his principal (*d*); and, in the absence of express instructions, to act according to any lawful and reasonable usage applicable to the matter in hand (*e*), or where there is no special usage, and in all matters left to his discretion, to act in good faith, to the best of his judgment, and solely for the benefit of the principal (*f*).

Illustrations.

1. An agent is instructed to sell certain shares when the funds reach eighty-five or more. He is bound to sell when the funds reach eighty-five, and has no discretion to wait until they go higher (*g*).

2. A by letter requests B to purchase 150 bales of cotton and forward a bill of lading, in exchange for which A undertakes to accept B's draft. B accepts the commission. B is bound to forward the bill of lading as soon as

(a) *Turpin v. Bilton* (1843), 12 L. J. C. P. 167; 5 M. & G. 455.

(b) *Coggs v. Bernard*, 2 Ld. Raym. 909; *Balfé v. West* (1853), 22 L. J. C. P. 15; 13 C. B. 466; *Elsee v. Gatward* (1793), 5 T. R. 143.

(c) See Article 42.

(d) Illustrations 1 to 5. *Smart v. Sanders* (1846), 3 C. B. 380; 15 L. J. C. P. 39; *Ex p. Mather* (1797), 3 Ves. 372.

(e) Illustrations 6 to 10. *Solomon v. Barker* (1862), 2 F. & F. 726; *Moore v. Mourgue* (1776), Cowp. 479; *Hurrell v. Bullard* (1862), 3 F. & F. 445; *Re Overweg*, *Haas v. Jurant*, [1900] 1 Ch. 209; 69 L. J. Ch. 255.

(f) *Gray v. Haig* (1854), 20 Beav. 219; *General Exchange Bank v. Horner* (1866), L. R. 9 Eq. 480; 39 L. J. Ch. 393; *East India Co. v. Henchman* (1791), 1 Ves. jun. 289; *Watkin v. Campbell* (1854), 1 Jur. (N.S.) 131; *Pariente v. Lubbock* (1855), 20 Beav. 58; 114 R. R. 1; *Comber v. Anderson* (1808), 1 Camp. 523; *Dyas v. Cruise* (1845), 8 Ir Eq. R. 407; Illustration 11.

(g) *Bertram v. Godfray* (1830), 1 Knapp, 381, P. C.

possible, and is not entitled to retain it until A gives security for payment. If he retain it, A is justified in refusing to accept the cotton (h).

3. A foreign merchant sends a bill of lading to his correspondent in England with instructions to insure the goods. If the correspondent accept the bill of lading, he is bound to insure (i).

4. A solicitor, retained to conduct an action, is expressly instructed by the client not to enter into any compromise. It is his duty to obey his client's instructions, even if counsel advise a compromise (k).

5. An auctioneer, at a sale without reserve, is instructed by the vendor not to sell for less than a certain sum. Such instructions are unlawful, and it is the duty of the auctioneer to accept the highest *bona fide* bid, even if it be for less than the sum mentioned (l).

6. A stockbroker is instructed to sell certain shares. It is his duty to sell for ready money, according to usage, in the absence of special directions to the contrary (m).

7. A stockbroker sells shares on behalf of a client. The shares are in the possession of the client's banker. The broker is under no obligation to pay to the banker the price at which the shares were sold against delivery of the shares, or to ask the jobber who bought them to pay the banker direct for them. He is only bound to carry the contract through according to the rules of the Stock Exchange, and the ordinary course of business (n).

8. It is the duty of an auctioneer, in the absence of special instructions, to sell for ready money only (o), but he may take a cheque in lieu of cash in payment of the deposit, according to the usual custom (p). An agent ought not, however, to accept a cheque in lieu of cash which he has been authorised to receive, unless it is customary to do so in the particular business in which he is employed (q).

9. Goods are intrusted to a broker for sale. It is usual in the particular trade to send an estimate of the value to the principal, in order that he may fix a reserve price. It is the broker's duty to send such an estimate to his principal (r).

10. It is the duty of a house or estate agent, where he is instructed to find a purchaser for property, to submit any offers which may be made to him to his principal, and not to enter into a contract for the sale of the property unless the principal has expressly authorised him to do so (s). The duty to

(h) *Barber v. Taylor* (1839), 5 M. & W. 527; 9 L. J. Ex. 21.

(i) *Smith v. Lascells* (1788), 2 T. R. 187; *Corlett v. Gordon* (1813), 3 Camp. 472.

(k) *Fray v. Voules* (1859), 28 L. J. Q. B. 232; 1 El. & El. 839. And see *Swinfen v. Swinfen* (1858), 2 De G. & J. 381; and *Neale v. Gordon-Lennox*, [1902] A. C. 465, as to the duty of counsel to act according to his client's wishes.

(l) *Sezwell v. Christie* (1776), Cowp. 395.

(m) *Wiltshire v. Sims* (1808), 1 Camp. 258.

(n) *Hawkins v. Pearse* (1903), 9 Com. Cas. 87.

(o) *Ferrers v. Robins* (1835), 2 C. M. & R. 152; *Williams v. Evans* (1866), L. R. 1 Q. B. 352; 45 L. J. Q. B. 111.

(p) *Farrer v. Lacy* (1885), 31 Ch. D. 42; 55 L. J. Ch. 149, C. A.

(q) *Lapè v. Westcott*, [1894] 1 Q. B. 272; 63 L. J. Q. B. 222, C. A.; Article 34.

(r) *Slomon v. Barker* (1862), 2 F. & F. 726.

(s) *Qadburn v. Moore* (1892), 61 L. J. Ch. 674; *Hamer v. Sharp* (1874), L. R. 19 Eq.

submit offers made continues until a binding contract of sale and purchase has been concluded (t).

11. A company's estate department acted for the vendor of a house. In ignorance of that fact, the company's building department acted for the purchaser and gave a report on the house which had the effect of reducing the price obtainable from the purchaser. Held, that the action of the building department was a breach of the company's duty to the vendor (u).

Execution of deeds under powers of attorney.—It was formerly necessary, in order to render a deed executed under a power of attorney binding on the principal, or to entitle him to sue thereon, that the deed should be executed in his name (x). But the Law of Property Act, 1925 (y), s. 123, provides that the donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument, or thing, in and with his own name and signature, and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

Article 46.

DUTY TO KEEP PRINCIPAL'S PROPERTY SEPARATE, AND TO PRESERVE CORRECT ACCOUNTS.

It is the duty of every agent—

- (a) to keep the money and property of his principal separate from his own and from that of other persons (z);
- (b) to preserve and be constantly ready with correct accounts of all his dealings and transactions in the course of his agency (a);
- (c) to produce to the principal, or to a proper person appointed by the principal, all books and documents in his hands relating to the principal's affairs (b); and

108; 44 L. J. Ch. 53; *Leacock v. Bromley* (1920), 37 T. L. R. 48. Comp. *Rosenbaum v. Belson*, [1900] 2 Ch. 267; 69 L. J. Ch. 569; *Keen v. Mear*, [1920] 2 Ch. 574; 89 L. J. Ch. 513.

(t) *Keppel v. Wheeler*, [1927] 1 K. B. 577; 96 L. J. K. B. 433, C. A.

(u) *Harrods, Ltd. v. Lemon*, [1931] 2 K. B. 157; 100 L. J. K. B. 219, C. A.

(x) See *White v. Cuyler* (1796), 6 T. R. 176; *Wilks v. Back* (1802), 2 East 142; *Berkeley v. Hardy* (1826), 5 B. & C. 355; *Frontin v. Small* (1726), 2 Ld. Raym. 1419; *Combe's Case*, 9 Co. Rep. 75.

(y) 15 Geo. 5, c. 20.

(z) *Gray v. Haig* (1854), 20 Beav. 219; *Clarke v. Tipping* (1846), 9 Beav. 284; *Gierreiro v. Peile* (1820), 3 B. & A. 616.

(a) *Gray v. Haig*, *supra*; *Clarke v. Tipping*, *supra*; *Pearse v. Green* (1819), 1 Jar. & W. 135; *Turner v. Burkinshaw* (1867), L. R. 2 Ch. 488; *Collyer v. Dudley* (1823), 7 C. & R. 421. Comp. *Re Lee*, *ex p. Neville* (1868), L. R. 4 Ch. 43.

(b) *Dadswell v. Jacobs* (1887), 34 Ch. D. 278; 56 L. J. Ch. 233, C. A. (The principal cannot call upon him to produce documents, etc., to an improper person, such as a rival or unfriendly person. *Ibid.*) As to the right to possession of books, etc., on the bankruptcy of the agent, see *Re Burnand*, *ex p. Wilson*, [1904] 2 K. B. 68; 73 L. J. K. B. 413, C. A., and on the bankruptcy of the principal, *Re Ellis*, [1908] W. N. 215; 25 T. L. R. 38.

(d) to pay over to the principal, on request, money received in the course of the agency to the use of the principal (c).

Where an agent is permitted to retain for investment money belonging to his principal, he is in the position of a trustee (d).

Where an agent fails to keep and preserve correct accounts, and is called upon for an account of his agency, everything will be presumed against him that is consistent with established facts (e). So, if he mix the property of the principal with his own, everything not proved to be his own will be deemed to be the principal's (f).

Where an agent pays his principal's money into his own banking account, he is responsible for the amount, in the event of the failure of the banker, even if acting gratuitously (g).

An agent who improperly refuses to pay over money on request is chargeable with interest from the date of the request (h).

Article 47.

DUTY TO EXERCISE DUE SKILL, CARE AND DILIGENCE (i).

Every agent acting for reward is bound to exercise such skill, care and diligence in the performance of his undertaking as is usual or necessary in or for the ordinary or proper conduct of the profession or business in which he is employed, or is reasonably necessary for the proper performance of the duties undertaken by him (k).

Every agent acting gratuitously is bound to exercise such

Questions sometimes arise on the termination of the agency, what documents prepared by the agent relating to the principal's affairs should be handed over to the principal. In *Bersford v. Driver* (1851), 14 Beav. 387; 20 L. J. Ch. 476, land agents were ordered to hand over memorandum books, a private rental and cash book and a field book. In *Gibbon v. Pease*, [1905] 1 K. B. 810; 74 L. J. K. B. 502, C. A., an architect was ordered to hand over the plans of a house after the work had been completed and paid for. But the principle does not apply where the relationship is not that of principal and agent, but that of client and professional man, to whom the client resorts for advice: see *Leicestershire C. C. v. Michael Faraday & Partners*, [1941] 2 K. B. 205; 110 L. J. K. B. 511, C. A.

(c) *Harsant v. Blaine* (1887), 56 L. J. Q. B. 511, C. A.; *Pearse v. Green* (1819), 1 Jac. & W. 135; *Edgell v. Day* (1865), L. R. 1 C. P. 80; 35 L. J. C. P. 7.

(d) *Burdick v. Garrick* (1870), L. R. 5 Ch. 233; 39 L. J. Ch. 369; *Power v. Power* (1884), L. R. 13 Ir. 281.

(e) *Gray v. Haig* (1854), 20 Beav. 219; *Jenkins v. Gould* (1827), 3 Russ. 385.

(f) *Lupton v. White* (1808), 15 Ves. 432.

(g) *Massey v. Banner* (1820), 1 Jac. & W. 241.

(h) *Harsant v. Blaine* (1887), 56 L. J. Q. B. 511, C. A. The Court may award interest on any debt or damages, under the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3.

(i) See also Article 58. The duty does not extend to parties other than the principal, unless the breach of it result in danger to life, limb or health: see *Old Gate Estates, Ltd. v. Toplis and Harding*, [1939] 3 A. E. R. 209; *Le Lievre v. Gould*, [1893] 1 Q. B. 491; 62 L. J. Q. B. 353, C. A. Nor does it apply where a person is appointed to determine a matter as arbitrator or quasi-arbitrator: *Pappa v. Rose* (1872), L. R. 7 C. P. 525; 41 L. J. C. P. 187, Ex. Ch.; *Tharsis Sulphur Co. v. Loftus* (1872), L. R. 8 C. P. 1; 42 L. J. C. P. 6; *Finnegan v. Allen*, [1943] 1 K. B. 425; 112 L. J. K. B. 323, C. A.

(k) *Beal v. South Devon Ry.* (1864), 3 H. & C. 337, Ex. Ch.; *Solomon v. Barker* (1862), 2 F. & F. 726; *Harnner v. Cornelius* (1858), 5 C. B. (N.S.) 236. And see Illustrations 1 to 10, in all of which the agent was acting for reward.

skill as he actually possesses, and such care and diligence as he would exercise in his own affairs (*l*); and, where he has held himself out to the principal as possessing skill adequate to the performance of the particular undertaking, such care and skill as is reasonably necessary for the performance thereof (*m*).

Every agent is bound to exercise reasonable care and diligence in protecting the moneys and property of his principal in his possession or custody, or under his control (*n*).

What is the usual or necessary, or a reasonable, degree of skill, care, or diligence, is a question of fact depending upon the nature of the agency, and the circumstances of the case.

Illustrations.

1. A house agent is employed to let houses, and is paid a commission of 5 per cent. He is bound to use reasonable care to ascertain the solvency of the tenants (*o*).

2. An insurance broker undertakes to effect an insurance. He is bound to use due diligence to perform what he has undertaken within a reasonable time (*p*); and where he is unable to effect the insurance according to the instructions, he must give notice to his principal of that fact (*q*).

3. An agent is employed to purchase a public-house. It is his duty to examine the takings, etc., and the fact that the principal has himself examined them on the advice of the agent does not exonerate him from liability for a breach of that duty (*r*).

4. An insurance broker is employed to insure from a particular point. It is his duty to insert in the policy all the clauses usually inserted in an insurance from that point (*s*).

5. A broker is employed on commission to purchase and ship scrap iron. He is not bound to inspect the iron for the purpose of ascertaining whether it is of the quality bought, because it is not part of a broker's ordinary business to inspect goods bought by him as such (*t*).

6. A share broker is employed to buy certain railway scrip. He buys on the market, in the ordinary course of business, what is usually sold as such scrip. He is not responsible to the principal because the scrip turns out not to be genuine, having had no notice that it was not genuine, and having bought it in the ordinary course of business (*u*).

(*l*) *Moffatt v. Bateman* (1869), L. R. 3 P. C. 115, P. C.; *Wilson v. Brett* (1843), 12 L. J. Ex. 264; 63 R. R. 528. Illustrations 11 to 13. See also Article 58, Illustration 20.

(*m*) *Beal v. South Devon Ry.* (1864), 3 H. & C. 337, Ex. Ch. Illustration 13. See also Article 58, Illustration 20.

(*n*) *Massey v. Banner* (1820), 1 Jac. & W. 241; *Maltby v. Christie* (1795), 1 Esp. 340; *Reeve v. Palmer* (1859), 28 L. J. C. P. 168; 5 C. B. (N.S.) 84. Illustrations 11 to 13.

(*o*) *Hayes (or Heys) v. Tindall* (1861), 30 L. J. Q. B. 362; 1 B. & S. 296.

(*p*) *Turpin v. Bilton* (1843), 5 M. & G. 455; 12 L. J. C. P. 167.

(*q*) *Callander v. Oelricks* (1839), 8 L. J. C. P. 25; 5 Bing. N. C. 58; 50 R. R. 602.

(*r*) *Smith v. Barton* (1866), 15 L. T. 294.

(*s*) *Mallough v. Barber* (1815), 4 Camp. 150.

(*t*) *Zwischenbart v. Alexander* (1860), 30 L. J. Q. B. 254; 1 B. & S. 234, Ex. Ch.

(*u*) *Lambert v. Heath* (1846), 15 M. & W. 480; *Mitchell v. Newhall* (1846), 15 L. J. Ex. 292; 15 M. & W. 308.

7. An insurance broker retains in his own hands a policy effected by him. He is bound to use due diligence to procure a settlement and payment of a loss arising thereunder (x).

8. A person who acts as a patent agent is bound to know the law relating to the practice of obtaining patents, and is responsible to his principal for injury caused through his ignorance of such law. Every person who acts as a skilled agent is bound to bring reasonable skill and knowledge to the performance of his duties (y).

9. A person who acts as a valuer of ecclesiastical property is bound to know the general rules applicable to the valuation of dilapidations; but he is not expected to have an accurate and precise knowledge of the law relating thereto (z).

10. An estate agent who undertakes to value property on behalf of an intending mortgagee must possess the necessary experience and skill to enable him to value that particular property; and if, being ignorant of the locality, he fail to make sufficient enquiry as to the values of properties in the neighbourhood, he is liable to his principal for all the damage caused by this neglect of duty; so that where he values the property, and advises an advance, at too large a figure, he may become liable for the expenses of abortive sales, insurance premiums, builders' accounts for upkeep, mortgagees' expenses and disbursements, agents' commission upon an ultimate sale, and unpaid principal and interest (a).

11. A rides a horse gratuitously for the purpose of exhibiting it. He is bound to exercise such skill as he actually possesses, and is responsible to his principal for any injury caused by his neglect to do so (b).

12. A general merchant undertakes, without reward, to enter a parcel of A's goods with a parcel of his own. He enters both parcels, by mistake, under a wrong denomination, and the goods are seized. He is not responsible to A for the loss, having taken the same care of A's goods as of his own (c).

13. A offers, without reward, to lay out £700 in the purchase of an annuity, and undertakes to obtain good security. He is bound to use reasonable care to lay out the money securely (d).

Article 48.

DUTY TO PAY OVER MONEY RECEIVED TO USE OF PRINCIPAL.

Subject to the provisions of Article 79, every agent who receives money to the use of his principal is bound to pay over or account for such money to the principal, notwithstanding

(x) *Bousfield v. Cresswell* (1810), 2 Camp. 545.

(y) *Lee v. Walker* (1872), L. R. 7 C. P. 121; 41 L. J. C. P. 91; *Lamphier v. Phipps* (1838), 8 C. & P. 475; *Parker v. Rolls* (1854), 14 C. B. 691.

(z) *Jenkins v. Betham* (1855), 24 L. J. C. P. 94; 15 C. B. 168.

(a) *Baxter v. F. W. Gapp & Co., Ltd.*, [1939] 2 K. B. 27; 108 L. J. K. B. 522, C. A.

(b) *Wilson v. Brett* (1843), 11 M. & W. 113; 12 L. J. Ex. 264.

(c) *Shiells v. Blackburne* (1789), 1 H. Bl. 159. And see *Bullen v. Swan Electric Engraving Co.* (1907), 23 T. L. R. 257, C. A. (bailee).

(d) *Whitehead v. Greetham* (1825), 2 Bing. 464, Ex. Ch.

claims made by third persons in respect thereof (e), even if the money were received in respect of a void (f) or illegal (g) transaction. Provided that, where money is obtained by an agent wrongfully, or is paid to him under a mistake of fact or for a consideration which fails, he may show that he has repaid it to the person who paid it to him (h); and where money is paid to him in respect of a voidable contract, he may show that the contract has been rescinded, and the money repaid, even where the contract was rescinded solely on the ground of his own fraud (i). Provided also, that no principal can enforce an unlawful transaction between himself and his agent (k).

An agent who receives money to the use of two or more principals jointly is bound to account to them jointly, and is not bound to pay over to one or more of them the whole or any part of such money without the consent of the other or others, whatever may be the rights of the principals in respect of such money as between themselves (l).

Every agent, in accounting for money received to the use of his principal, is entitled to take credit for all just allowances (m), and for any sums expended by him with the authority of the principal, even if they were expended for an unlawful purpose (n); but authority to deal with money in an unlawful manner may be revoked at any time before the money has been actually paid away (o).

Illustrations.

1. A ship which is the property of A is transferred to B as security for a debt. B insures the ship for and on behalf of A & Co., and charges them with the premiums. The ship is lost, and B receives the insurance money. B must pay over the money, after deducting the amount of his debt, to A & Co., and cannot set up A's title, having insured for and on behalf of A & Co. (p). So, an insurance broker who receives money under a policy cannot dispute the claim of his principal on the ground that other persons are interested in the subject-matter of the insurance (q). A solicitor who has received money on behalf of his client must account to him therefor and cannot set up a *jus tertii* (r).

(e) *Nickolson v. Knowles* (1820), 5 Madd. 47. Illustrations 1 and 2. See also *Eames v. Hacon* (1881), 18 Ch. D. 347; 50 L. J. Ch. 740, C.*A.

(f) Illustration 5.

(g) Illustration 4.

(h) See Article 127.

(i) Illustration 6.

(k) Illustration 4.

(l) Article 6; *Halsall v. Griffith* (1834), 2 C. & M. 679; *Heath v. Chilton* (1844), 12 M. & W. 632; 13 L. J. Ex. 225. See also *Lee v. Sankey* (1872), L. R. 15 Eq. 204; *Innes v. Stephenson* (1831), 1 M. & Rob. 145; *Jones v. Cuthbertson* (1873), L. R. 8 Q. B. 504; 42 L. J. Q. B. 221, Ex. Ch.

(m) *Dale v. Sollet* (1767), 4 Burr. 2133.

(n) *Baynton v. Cattle* (1833), 1 M. & Rob. 265.

(o) *Bone v. Ekless* (1860), 29 L. J. Ex. 438; 5 H. & N. 925; *Taylor v. Bowers* (1876), 1 Q. B. D. 291; 45 L. J. Q. B. 163, C. A.

(p) *Dixon v. Hamond* (1819), 2 B. & A. 310.

(q) *Roberts v. Ogilby* (1821), 9 Price, 269.

(r) *Blaustein v. Maltz*, [1937] 2 K. B. 142; 106 L. J. K. B. 471, C. A.

2. Money is paid to an agent on account of his principal, by a person who is indebted to the agent also. He must pay over the money to the principal, and is not entitled to appropriate it to his own debt (s).

3. A deposits bank notes with his banker, who sends them to the issuing bank and receives credit for the amount. That is equivalent to actual payment, and A's banker must account to A for the amount, though he never actually received payment of the notes, in consequence of the failure of the issuing bank (t).

4. An agent receives money on his principal's behalf under an illegal contract. The agent must account to the principal for the money, and cannot set up the illegality of the contract, which the other contracting party has waived by paying the money (u). Otherwise, if the contract of agency had been unlawful (x).

5. A turf commission agent is employed to make bets. He must pay over to the principal the amount of any winnings actually received by him in respect of such bets, though the bets themselves are void by the Gaming Act, 1845, and though, in consequence of the provisions of the Gaming Act, 1892, he would not be able to recover from the principal the amount of any losses paid in respect of the bets (y).

6. An agent sells a horse and receives the purchase-money. The sale is subsequently rescinded on the ground of the agent's fraud, and the purchase-money is repaid. The agent is not liable to the principal for the amount of the purchase-money (z).

7. An insurance broker receives notice that the assured under a policy is entitled to the return of a portion of certain premiums held by the broker. The broker is entitled to deduct such portion in an action by the underwriters for the full premiums, if he act as agent for both parties (a).

8. A factor raises money by wrongfully pledging the goods of his principal. The principal may adopt the transaction, and treat the money raised as money had and received to his use (b).

Article 49.

ESTOPPED FROM DENYING PRINCIPAL'S TITLE.

Where a person is in possession of property as an agent, his possession, as evidence of title (c), and for the purpose of

(s) *Heath v. Chilton* (1844), 12 M. & W. 632; 13 L. J. Ex. 225; *Shaw v. Picton* (1825), 4 B. & C. 715.

(t) *Gillard v. Wise* (1826), 5 B. & C. 134. And see *Pollard v. Bank of England* (1871), L. R. 6 Q. B. 623; 40 L. J. Q. B. 233; *McCarthy v. Colwin* (1839), 8 L. J. Q. B. 158; 9 A. & E. 607.

(u) *Bousfield v. Wilson* (1846), 16 L. J. Ex. 44; 16 M. & W. 185; *Farmer v. Russell* (1798), 1 B. & P. 296; *Tenant v. Elliott* (1797), 1 B. & P. 3.

(x) *Booth v. Hodgson* (1795), 6 T. R. 405.

(y) 8 & 9 Vict. c. 109; 55 & 56 Vict. c. 9; *De Mattos v. Benjamin* (1894), 63 L. J. Q. B. 245; *Bridger v. Savage* (1885), 15 Q. B. D. 363; 54 L. J. Q. B. 464, C. A.; overruling *Beyer v. Adams* (1857), 26 L. J. Ch. 841. As to the Gaming Act, 1892, see Article 72.

(z) *Murray v. Mann* (1848), 2 Ex. 638; 17 L. J. Ex. 256.

(a) *Shee v. Clarkson* (1810), 12 East, 507.

(b) *Bonzi v. Stewart* (1842), 5 Scott. N. R. 1, 26. See Article 32.

(c) *Hitchings v. Thompson* (1850), 5 Ex. 50; *Last v. Dinn* (1859), 28 L. J. Ex. 94.

acquisition of title under a Statute of Limitations (*d*), is deemed to be the possession of the principal.

No agent is permitted to deny the title of his principal, or to set up the title of any third person in opposition to that of the principal, to any goods or chattels intrusted to him by, or which he has expressly or impliedly agreed to hold on behalf of, the principal (*e*). Provided, that where a third person is entitled to the goods or chattels as against the principal, and claims them from the agent, the agent may set up the title of that third person, if he does so on his behalf and by his authority, or if he has delivered up the goods or chattels to him, unless at the time when the goods or chattels were so intrusted to the agent, or when the agent so agreed to hold them on behalf of the principal, he had notice of the claim of such third person (*f*).

Illustrations.

1. An agent is permitted, for the convenient performance of his duties as such, to occupy premises belonging to his principal. The agent cannot acquire any estate therein, by reason of such occupation, even when he is permitted to use the premises for an independent business of his own (*g*). No agent can acquire a title adverse to his principal unless he can show that the acts upon which he relies were done in respect of his title, and not of his agency (*h*).

2. A receives the rents of certain properties as an agent, and pays them into a separate account at his own bank. The principal dies intestate. A continues to receive the rents for more than twelve years after the death of the principal, stating to several of the tenants that he is acting for the heir, whoever he may be. Subsequently, within a reasonable time after the heir is ascertained, his assignee brings an action against A, claiming possession of the property and an account of the rents and profits. A claims the property as his own, and pleads the Statute of Limitations. The plaintiff is entitled to possession of the property, and an account of all the rents and profits received by A since the principal's death (*i*).

3. A solicitor paid off a mortgage debt due from a client, and entered into possession of the mortgaged property. Held, that he must be taken to have acted as the agent of the client, and therefore was not entitled to set up the Statute of Limitations in an action by the client for redemption (*k*).

4. A receives the rents of certain property as B's agent for more than twelve years, and duly pays them over to B. B thereby acquires a good

(*d*) Illustrations 1 to 4; *Cooper v. De Tastet* (1829), Tamlyn, 177.

(*e*) Illustrations 5 to 9; Article 48, Illustration 1; *Scott v. Crawford* (1842), 4 M. & G. 1031. See, however, Article 79.

(*f*) Illustrations 10 and 11; *Hunt v. Maniere* (1864), 34 L. J. Ch. 142.

(*g*) *White v. Bayley* (1861), 30 L. J. C. P. 253; 10 C. B. (n.s.) 227.

(*h*) *Att.-Gen. v. London Corporation* (1849), 19 L. J. Ch. 314; 2 Mac. & G. 247.

(*i*) *Lyell v. Kennedy* (1889), 14 App. Cas. 437; 59 L. J. Q. B. 268, H. L. And see *Smith v. Bennett* (1874), 30 L. T. 100.

(*k*) *Ward v. Carttar* (1865), L. R. 1 Eq. 29.

prescriptive title to the property, in the absence of fraud, even if A were the true owner (l). Possession by an agent, as such, does not preserve his adverse rights (l).

5. A makes advances for the purpose of a mine, in order to obtain the ore, which he consigns to B for sale, B undertaking to account to him for the proceeds. B cannot set up any paramount title to the ore, or dispute A's right to the proceeds, on the ground that there are rights of third persons existing independently of the contract between A and B (m).

6. A buys goods on B's behalf, and delivers them to carriers at B's risk. A is estopped from disputing B's title to the goods (n).

7. The servant of a wharfinger gives a receipt for goods, in which there is an undertaking to deliver the goods to A. The wharfinger will not be permitted to deny A's title to the goods on their arrival (o).

8. A warehouseman agrees to hold goods, described in a delivery order, on behalf of the transferee of such order. In an action by the transferee against the warehouseman for conversion of the goods, it is no defence that the goods in question were not separated from the bulk, and that therefore the property in the goods had not passed to the plaintiff (p). A warehouseman or wharfinger is an agent for the person in whose name he holds, or on whose behalf he has undertaken to hold, goods, and is not permitted to set up the title of any other person (q).

9. A delivers goods to a carrier, consigned to B. The property in the goods has not, in fact, passed to B. A countermands his instructions, and the carrier re-delivers the goods to him. The carrier may set up A's title, in an action by B, carriers not being, as such, agents of their consignees (r).

10. A wrongfully distrains B's goods and delivers them to C, an auctioneer, for sale, C having at the time no knowledge of B's adverse claim. B subsequently gives notice of his title to C, and claims the proceeds. C may set up the title of B, in an action by A for the proceeds, provided that he defends on B's behalf and with his authority (s).

11. A sells goods as B's agent, having at the time when the goods are intrusted to him notice that C claims them. A cannot, in an action by B for the proceeds, set up the title of C, even where C was wrongfully deprived of the goods by B, A having elected to act as B's agent for the sale of the goods after receiving notice of C's adverse claim (t).

(l) *Williams v. Potts* (1871), L. R. 12 Eq. 149; 40 L. J. Ch. 775.

(m) *Zulueta v. Vincent* (1851), 1 De G. M. & G. 315.

(n) *Green v. Maitland* (1842), 4 Beav. 524.

(o) *Evans v. Nichol* (1841), 4 Scott, N. R. 43. And see *Wood v. Tassell* (1844), 6 Q. B. 234.

(p) *Woodley v. Coventry* (1863), 32 L. J. Ex. 185; *Stonard v. Dunkin* (1810), 2 Camp. 344.

(q) *Betteley v. Reed* (1843), 4 Q. B. 511; 12 L. J. Q. B. 172; *Holl v. Griffin* (1833), 3 L. J. C. P. 17; 10 Bing. 246; *Gosling v. Birnie* (1831), 7 Bing. 339; *Henderson v. Williams*, [1895] 1 Q. B. 521; 64 L. J. Q. B. 308, C. A.

(r) *Sheridan v. New Quay Co.* (1858), 28 L. J. C. P. 58; 4 C. B. (N.S.) 618.

(s) *Biddle v. Bond* (1865), 34 L. J. Q. B. 137; 6 B. & S. 225; *Ross v. Edwards* (1895), 73 L. T. 100, P. C.; *Rogers v. Lambert*, [1891] 1 Q. B. 318; 60 L. J. Q. B. 187, C. A.; *Thorne v. Tilbury* (1858), 27 L. J. Ex. 407; 3 H. & N. 534. *Semble*, this principle is limited to bailment and title paramount to bailments: *Blaustein v. Maltz*, [1937] 2 K. B. 142; 106 L. J. K. B. 471, C. A.

(t) *Re Sadler, ex p. Davies* (1881), 19 Ch. D. 86, C. A.

*DUTIES ARISING FROM THE FIDUCIARY CHARACTER OF
THE RELATIONSHIP.*

Article 50.

DUTY TO MAKE FULL DISCLOSURE WHERE ANY PERSONAL INTEREST.

No agent is permitted to enter, as such, into any transaction in which he has a personal interest in conflict with his duty to his principal, unless the principal, with a full knowledge of all the material circumstances, and of the exact nature and extent of the agent's interest, consent (*u*). Where any transaction is entered into in violation of this rule, the principal, when the circumstances come to his knowledge, may repudiate the transaction, or may affirm it and recover from the agent any profit made by him in respect thereof (*x*).

Illustrations.

1. A stockbroker was employed to purchase certain shares. He purchased the shares from his own trustee without informing the principal of the fact. The transaction was set aside, after an interval of many years, without inquiry whether a fair price was charged or not (*y*). Lapse of time is no bar to the action, so long as the principal remains, without any fault on his part, in ignorance of the fraud (*z*).

2. A director of a company enters into a contract on behalf of the company with a firm of which he is a member. The contract is voidable in equity by the company, quite apart from the question of its fairness or unfairness (*a*). It is the duty of a director to promote the interests of the company, and he is not permitted to enter into engagements in which his own interest is in conflict with that duty (*a*). But, in the absence of fraud, he is not bound to disclose to the company breaches of his obligation arising out of the relationship so as to give the company the opportunity of dismissing him (*b*).

3. A solicitor entered into an arrangement under which he was to receive a share of certain property, and also a share of the profit arising from its sale. He subsequently acted as solicitor in purchasing a large portion of the property, without disclosing his interest therein to the client for whom he so acted. Held, that he was a trustee for the client of a proportionate part of

(*u*) *Rothschild v. Brookman* (1831), 2 Dow & Cl. 1888, H. L.; *Parker v. McKenna* (1874), L. R. 10 Ch. 96; 44 L. J. Ch. 425; *Gardner v. McCutcheon* (1842), 4 Beav. 534; *East India Co. v. Henchman* (1791), 1 Ves. jun. 289; *Re Birt, Birt v. Burt* (1893), 22 Ch. D. 604; 52 L. J. Ch. 397; *Tiessen v. Henderson*, [1899] 1 Ch. 861; 68 L. J. Ch. 353.

(*x*) *Rothschild v. Brookman*, *supra*; *Bentley v. Craven* (1853), 19 Beav. 75; *Burton v. Wookey* (1822), 6 Madd. 367. And see Articles 52, 55 and 69.

(*y*) *Gillett v. Peppercorne* (1840), 3 Beav. 78; *King v. Howell* (1910), 27 T. L. R. 114. C. A.; *Armstrong v. Jackson*, [1917] 2 K. B. 822; 86 L. J. K. B. 1375.

(*z*) *Oelkers v. Ellis*, [1914] 2 K. B. 139; 83 L. J. K. B. 658.

(*a*) *Aberdeen Ry. v. Blakie* (1854), 2 Eq. R. 1281, H. L. See also *Transvaal Lands Co. v. New Belgium, etc., Co.*, [1914] 2 Ch. 488; 84 L. J. Ch. 94, C. A.; *Re Thomson*, [1930] 1 Ch. 203; 99 L. J. Ch. 156; *Regal (Hastings) v. Gulliver*, [1942] 1 A. E. R. 378.

(*b*) *Bell v. Lever Brothers, Ltd.*, [1932] A. C. 161; 101 L. J. K. B. 129, H. L.

the share taken by him, and that he must account for the full amount of the profit made by him upon the sale, with interest at the rate of 5 per cent. (c).

4. An auctioneer, who was employed to sell an estate, purchased it himself. The transaction was set aside, after an interval of thirteen years (d). No agent for the sale of property is permitted to purchase it himself, and no agent to purchase is permitted to buy his own property on the principal's behalf, unless he make full disclosure to the principal; and the fact that he pays or charges a fair price is immaterial (e). So, an agent of a trustee for sale or of a mortgagee selling under his power of sale, who is employed as agent in the matter of the sale (f), cannot purchase the property sold (g); and a solicitor who conducts a sale of property must not purchase it without a full explanation to the vendor (h). But an auctioneer is not deemed to be an agent of the purchaser at a sale by auction, for this purpose, and may (probably) sell his own property at such a sale without disclosing that he is the owner (i).

5. A broker is employed to sell goods. He sells them, ostensibly to A, really to A and himself jointly. While the goods are still in the possession of the broker, he becomes bankrupt, A also being insolvent. The principal may repudiate the contract and recover the goods specifically from the trustee in bankruptcy of the broker (k).

6. A firm of brokers were authorised to purchase goods. They delivered bought notes to the principal, which purported to be notes of a contract of which the brokers guaranteed performance, but which did not disclose the sellers. The principal paid the brokers their commission and a deposit, and subsequently discovered that one of the brokers intended to perform the contract himself. The principal was held to be entitled to repudiate the contract, and the brokers were ordered to repay the deposit and commission, with interest (l). No agent can become a principal and deal on that footing without full and fair disclosure (m).

7. An agent for sale sells to a company of which he is a director and large shareholder. The sale is not binding on the principal (n). Where an agent for sale takes any interest in a purchase negotiated by him, he must fully disclose all the material facts, and the exact nature and extent of his interest. It is not sufficient merely to disclose that he has an interest, or to make such

(c) *Tyrrell v. Bank of London* (1862), 10 H. L. Cas. 26; 31 L. J. Ch. 369.

(d) *Oliver v. Court* (1820), Dan. 301.

(e) *Louth v. Louth* (1806), 13 Ves. 95, 102; *Massey v. Davies* (1794), 2 Ves. jun. 317; *Bentley v. Cruven* (1853), 18 Beav. 75; *Rothschild v. Brookman* (1831), 2 Dow & Cl. 188, H. L.

(f) See *Nutt v. Easton*, [1900] 1 Ch. 29; 69 L. J. Ch. 46, C. A.

(g) *Whitcomb v. Minchin* (1820), 5 Madd. 91; *Martinson v. Clowes* (1882), 21 Ch. D. 857; 51 L. J. Ch. 594; *Lawrance v. Galsworthy* (1857), 3 Jur. (N.S.) 1049.

(h) *Re Bloye's Trust* (1849), 19 L. J. Ch. 89; 1 Mac. & Gr. 488; *Ex p. James* (1803), 8 Ves. 337.

(i) *Flint v. Woodin* (1852), 9 Hare, 618.

(k) *Ex p. Huth, re Pemberton* (1840), 4 Dea. 294.

(l) *Wilson v. Short* (1847), 17 L. J. Ch. 289; 6 Hare, 366.

(m) *Ibid.*; *Williamson v. Barbour* (1877), 9 Ch. D. 529; 50 L. J. Ch. 147; *Robinson v. Mollett* (1874), L. R. 7 H. L. 802; 44 L. J. C. P. 362, H. L.; Article 72, Illustration 12. Cf. *Ellis & Co.'s Trustee v. Watsham* (1923), 155 L. T. Jo. 363 ("bought of ourselves as principals"—held sufficient disclosure).

(n) *Salomons v. Pender* (1865), 34 L. J. Ex. 95; 3 H. & C. 639.

statements as would put the principal on inquiry. The burden of proving full disclosure lies on the agent (o).

8. A director of a railway company purchased, on the company's behalf, the concession of a line of which he was the concealed owner. Held, that the company might repudiate the transaction (p). So, where a director sold a vessel to his company as from a stranger, it was held that he must account to the company for the profit made by him, with interest (q). In such cases, the principal may rescind the transaction, or may affirm it and claim the profit made, at his option (r).

9. *Special customs inconsistent with this Article are unreasonable.*—A broker is authorised to sell certain shares, and pay himself certain advances out of the proceeds. A custom whereby he may himself take over the shares at the price of the day, in the event of his being unable to find a purchaser at an adequate price, is unreasonable, and such a transaction is not binding on the principal unless he had notice of the custom at the time when he gave the broker the authority, even if a forced sale of the shares would inevitably have realised less than the price given by the broker (s). So, a custom whereby an agent for sale may purchase at the minimum price if he cannot find a purchaser is unreasonable (t). Every custom or usage which converts an agent into a principal, or otherwise gives him an interest at variance with his duty, is unreasonable, and no such custom or usage is binding on any principal who has not notice thereof (u).

Article 51.

AGENT PURCHASING PROPERTY BECOMES A TRUSTEE.

Where an agent who is employed to purchase property on behalf of his principal, purchases it in his own name or on his own behalf, and it is conveyed or transferred to him, he becomes a trustee thereof for the principal (x).

Article 52.

DUTY TO MAKE FULL DISCLOSURE WHERE HE DEALS WITH THE PRINCIPAL.

Where an agent enters into any contract or transaction with his principal, or with his principal's representative in

(o) *Dunne v. English* (1874), L. R. 18 Eq. 524.

(p) *Gt. Luxembourg Ry. v. Magnay* (1858), 25 Beav. 586.

(q) *Benson v. Heathorn* (1842), 1 Y. & Coll. C. C. 326.

(r) *Re Cape Breton Co.* (1884), 26 Ch. D. 221; 29 Ch. D. 795, C. A.; *Cavendish Bentinck v. Fenn* (1887), 12 App. Cas. 652, H. L.; *Tiessen v. Henderson*, [1899] 1 Ch. 861; 68 L. J. Ch. 353; *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate*, [1899] 2 Ch. 392; 68 L. J. Ch. 699, C. A. And see Article 55.

(s) *Hamilton v. Young* (1881), 7 L. R. Ir. 289; *Rothschild v. Brookman* (1831), 2 Dow & Cl. 188; 30 R. R. 147, H. L. See, however, Article 71, Illustration 13.

(t) *De Busasche v. Alt* (1877), 8 Ch. D. 286; 47 L. J. Ch. 381, C. A.

(u) *Robinson v. Mollett* (1874), L. R. 7 H. L. 802; 44 L. J. C. P. 362, H. L. See, however, Article 71, Illustration 13.

(z) *Lees v. Nuttall* (1834), 2 Myl. & K. 819; *Austin v. Chambers* (1837), 6 Cl. & F. L. H. L.; *Bartlett v. Pickersgill*, 1 Cox, 15; *James v. Smith*, [1891] 1 Ch. 384. See also *Taylor v. Salmon* (1838), 4 Myl. & Cr. 139.

interest, he must act with perfect good faith, and make full disclosure of all the material circumstances, and of everything known to him respecting the subject-matter of the contract or transaction which would be likely to influence the conduct of the principal or his representative (y).

Where any question arises as to the validity of any such contract or transaction, or of any gift made by a principal to his agent, the burden of proving that no advantage was taken by the agent of his position, or of the confidence reposed in him, and that the transaction was entered into in perfectly good faith and after full disclosure, lies upon the agent (y).

Where a principal or his representative seeks to set aside any such contract or transaction, on the ground of want of disclosure or good faith, he must take proceedings for that purpose within a reasonable time after the circumstances he relies upon become known to him (z).

Illustrations.

1. A agreed with B that A would furnish B with particulars of houses which A might think suitable for purchase by B. A, having found a suitable house, procured C to purchase it for £2,000, the purchase-money being provided by A; and thereupon purported to buy it from C for £4,500. A then informed B that he had purchased the house for £4,500, and offered it to B for £5,000, representing that this price would allow a profit to A of £500. B purchased the house from A for £5,000. Held, that A was the agent of B for the purpose of furnishing particulars of suitable houses; that though an agent might terminate the relationship of principal and agent by selling to his principal property which belonged to himself, it was his duty to act honestly and faithfully, and, if he concealed material facts, obtaining an unfair advantage by fraud, the relationship was not terminated by such a transaction; and that, A, having concealed the true nature of the transaction by fraud, was liable to account to B for all profits obtained by A without B's knowledge and consent (a).

2. A manager of a bank, who was permitted to carry on a separate business on his own account, lent money from the bank for the purposes of such business, upon the security of bills which he had not indorsed. The drawers and acceptors of the bills became insolvent. Held, that the manager was bound to make good the loss. He ought not to have granted himself any accommodation nor acquired any personal benefit in the course of his agency, without disclosing all the circumstances to the directors of the bank (b).

(y) *Molony v. Kernan* (1842), 2 Dr. & War. 31; *Waters v. Shaftesbury* (1866), 14 L. T. 184; *Charter v. Trevelyan* (1842), 11 Cl. & F. 714, H. L.; *Savery v. King* (1856), 5 H. L. Cas. 627; 25 L. J. Ch. 482, H. L.; *Ward v. Sharp* (1883), 53 L. J. Ch. 313; *Jones v. Thomas* (1837), 2 Y. & Coll. 498; *Consett v. Bell* (1841), 1 Y. & Coll. C. C. 569; *Collins v. Hare* (1828), 2 Bli. (n.s.) 106, H. L.; *Demerara Bauzite Co. v. Hubbard*, [1923] A. C. 673; 92 L. J. P. C. 148. And see Illustrations.

(z) Illustration 11. *De Montmorency v. Devereux* (1840), 7 Cl. & F. 188, H. L.; *Champion v. Rigby* (1830), 1 Russ. & M. 539; *Clanricarde v. Henning* (1860), 30 L. J. Ch. 865; 30 Beav. 175; *Lyddon v. Moss* (1859), 4 De G. & J. 104; *Flint v. Woodin* (1852), 9 Hare, 618.

(a) *Regier v. Campbell-Stuart*, [1939], Ch. 766; 108 L. J. Ch. 321.

(b) *Gwatkin v. Campbell* (1854), 1 Jur. (n.s.) 131.

3. An agent for the management of trust property purchases part of such property from the *cestui que trust*. The agent, to support the transaction, must show not only that he gave full value, but also that he dealt at arm's length, and fully disclosed everything known to him which tended to enhance the value of the property (c).

4. A steward contracts with his employer for a lease. He must show that he is giving as high a rent as it would have been his duty to obtain from a third person, and that his employer was fully informed of every circumstance affecting the value of the property which was, or ought to have been, within the steward's knowledge (d).

5. An agent for the vendor of property is precluded from contracting with the purchaser for the payment of commission, unless he make full disclosure to both (e).

6. A director proposes to contract with his company, it being provided by the articles of association that directors may contract with the company on disclosing their interest. It is his duty to declare the full extent and exact nature of his interest (f). By the Companies Act, 1929, s. 149, it is the duty of a director of a company, who is in any way, whether directly or indirectly, interested in any contract or proposed contract with the company, to declare the nature of his interest at a meeting of the directors of the company, and a director who fails to comply with this enactment is liable to a fine not exceeding £100; but it is sufficient to give a general notice to the directors that the director interested is a member of a specified company or firm and is to be regarded as interested in any contract to be made with them. The section is not to prejudice the operation of any rule of law restricting directors from having any interest in contracts with the company.

7. A solicitor purchases property from his client's trustee in bankruptcy. He must make a full disclosure of all the knowledge acquired by him respecting such property during the time when he was acting as solicitor for the bankrupt (g).

8. A solicitor purchased property from a former client, and concealed a material fact. The transaction was set aside, although there was another solicitor acting on behalf of the plaintiff (h). But the rule that an agent must disclose knowledge acquired by him as such, does not, in general, apply where the agent has ceased to act, and there is another agent, with equal means of knowledge, acting for the principal in the transaction (i).

(c) *King v. Anderson* (1874), 8 Ir. R. Eq. 147. And see *Dally v. Wonham* (1863), 32 L. J. Ch. 790; 33 Beav. 154.

(d) *Selsey v. Rhoades* (1824), 2 S. & S. 41; *Watt v. Grove* (1805), 2 Sch. & Lef. 492.

(e) *Regier v. Campbell-Stuart*, [1939] Ch. 766; 106 L. J. Ch. 321.

(f) *Fullwood v. Hurley*, [1928] 1 K. B. 498; 96 L. J. K. B. 976, C. A.

(g) *Imperial Mercantile Credit Co. v. Coleman* (1873), L. R. 6 H. L. 189; 42 L. J. Ch. 644, H. L.; *Gluckstein v. Barnes*, [1900] A. C. 240; 69 L. J. Ch. 385, H. L. Comp. *Chesterfield Colliery Co. v. Black* (1878), 37 L. T. 740.

(h) *Luddy's Trustees v. Peard* (1886), 33 Ch. D. 500; 55 L. J. Ch. 884. And see *Boswell v. Coaks* (1884), 27 Ch. D. 424, C. A.; 11 App. Cas. 232, H. L.

(i) *Gibbs v. Daniel* (1862), 4 Giff. 1.

(j) *Scott v. Dunbar* (1828), 1 Moll. 442. And see *Edwards v. Meyrick* (1842), 2 Hare, 60; *Montesquieu v. Sandys* (1811), 18 Ves. 302.

9. An agent purchases his principal's property in the name of a third person. The transaction will be set aside without inquiry as to the adequacy of the price. An agent may purchase property from his principal, provided he deal at arm's length and fully disclose all that he knows respecting the property; but if any underhand dealing or concealment appear, the transaction will be set aside on the application of the principal (*k*).

10. A director of a railway company contracted with the company to take refreshment rooms. The Court refused to decree specific performance of the contract against the company (*l*).

11. If a solicitor take a mortgage from his client, the Court will not enforce any unusual stipulations in the mortgage disadvantageous to the client (*m*), and will restrain the solicitor from exercising his rights as mortgagee in an unfair or inequitable manner (*n*). Where a power of sale exercisable at any time was inserted in such a mortgage without the usual proviso requiring interest to be in arrear or notice to be given, and the solicitor sold the property under the power, he was held liable to the client in damages as for an improper sale, it not being shown that he had explained to the client the unusual nature of the power (*o*).

12. A solicitor who purchases property from his client must show that the price was adequate, that he took no advantage of his position, and that the sale was as advantageous to the client as any that the solicitor could have obtained, with the exercise of due diligence, from a third person (*p*).

13. A bill to set aside the purchase of property by an agent was dismissed, with costs, on proof that the principal had distinct notice, at the time of the transaction, that the agent was one of the beneficial purchasers, no proceedings having been taken to set it aside for more than six years, and the property having advanced in value in the meantime (*q*).

Gifts to Agents.

14. A client, who had recovered certain property after protracted litigation, shortly afterwards conveyed, by deed of gift, a valuable portion of such property to the counsel engaged on his behalf, in consideration of services, etc., rendered in connection with its recovery. The deed was set aside on the ground

(*k*) *McPherson v. Watt* (1877), 3 App. Cas. 254, H. L.; *Murphy v. O'Sheu* (1845), 8 Ir. Eq. Rep. 329; *Crowe v. Ballard* (1790), 2 Cox, 253; *Lewis v. Hillman* (1852), 3 H. L. Cas. 607, H. L.; *Cane v. Allen* (1814), 2 Dow, 289, H. L.; *Uppington v. Bullen* (1842), 2 Dr. & War. 184.

(*l*) *Flanagan v. G. W. Ry.* (1868), 19 L. T. 345.

(*m*) *Cowdry v. Day* (1859), 29 L. J. Ch. 39; 1 Giff. 316; *Eyre v. Hughes* (1876), 2 Ch. D. 148; 45 L. J. Ch. 395.

(*n*) *Macleod v. Jones* (1883), 24 Ch. D. 289; 53 L. J. Ch. 145, C. A.; *Pearson v. Benson* (1860), 28 Beav. 598.

(*o*) *Readdy v. Prendergast* (1887), 56 L. T. 790, C. A.; *Cockburn v. Edwards* (1881), 18 Ch. D. 449; 51 L. J. Ch. 46, C. A.; *Craddock v. Rogers* (1884), 53 L. J. Ch. 968, C. A. Comp. *Pooley v. Whetham* (1886), 2 T. L. R. 808, C. A.

(*p*) *Savery v. King* (1856), 5 H. L. Cas. 627; 25 L. J. Ch. 482; *Pisani v. Gibraltar* (1874), L. R. 5 P. C. 516, P. C.; *Spencer v. Topham* (1856), 22 Beav. 573; *Gibson v. Jeyes* (1801), 6 Ves. 266; *Holman v. Loynes* (1854), 23 L. J. Ch. 529; 4 De G. M. & G. 270; *Gresley v. Mousley* (1862), 31 L. J. Ch. 537; *Wright v. Carter*, [1903] 1 Ch. 27; 72 L. J. Ch. 138, C. A.; *Moody v. Cox*, [1917] 2 Ch. 71; 86 L. J. Ch. 424, C. A.

(*q*) *Wentworth v. Lloyd* (1864), 10 H. L. Cas. 589, H. L. Comp. *De Buseche v. All* (1877), 8 Ch. D. 286, C. A.; *Savery v. King* (1856), 5 H. L. Cas. 627.

of want of independent advice (*r*). So, where a client settled property in trust for himself for life, and then for his niece, who was the wife of his solicitor, for her separate use, the deed was set aside, on the ground that the client had not had independent advice (*s*). A solicitor is not permitted to bargain with his client for any benefit beyond the amount of his legal remuneration, and during the time he is acting as solicitor for the client, he is incapable of accepting any gift or reward besides such remuneration, even where there is no suspicion of any fraud, misrepresentation or undue influence (*t*). The executor of a deceased client was held to be entitled to have a gift from the deceased to her solicitor set aside, although the deceased, after the confidential relationship had ceased, had expressed her intention to abide by the gift, the circumstances not being such as would have debarred her, at the time of her death, from having it set aside (*u*). This principle does not, however, apply to gifts by will (*x*); and, except in the case of solicitor and client, the general rule is that a gift *inter vivos* from principal to agent is valid if the agent prove that there was no undue influence on his part (*y*).

Article 53.

MUST NOT USE MATERIAL OR INFORMATION ACQUIRED IN COURSE OF AGENCY.

No agent is permitted, unless with the consent of his principal, either during or after the termination of the agency, to make use in any manner prejudicial to the interests of the principal, of any materials or information acquired in the course of the agency (*z*).

Article 54.

DUTY TO ACCOUNT IN EQUITY.

It is the duty of every agent to render just and true accounts of his agency to the principal, and in cases of general agency of a fiduciary character the principal has a right to have an account taken in a Court of equity (*a*). In the case of a single

(*r*) *Brown v. Kennedy* (1864), 33 L. J. Ch. 342; 4 De G. J. & S. 217; *Rhodes v. Bute* (1865), L. R. 1 Ch. 252; 35 L. J. Ch. 267.

(*s*) *Liles v. Terry*, [1895] 2 Q. B. 679; 65 L. J. Q. B. 34, C. A. See also *Lloyd v. Coote*, [1915] 1 K. B. 242; 84 L. J. K. B. 567.

(*t*) *Morgan v. Minnett* (1877), 6 Ch. D. 638; *O'Brien v. Lewis* (1863), 32 L. J. Ch. 569; *Wright v. Proud* (1806), 13 Ves. 138; *Tomson v. Judge* (1855), 24 L. J. Ch. 785; 3 Drew. 306; *Middleton v. Welles* (1785), 4 Bro. P. C. 245, H. L.; *Saunderson v. Glass* (1742), 2 Atk. 297; *Wright v. Carter*, [1903] 1 Ch. 27; 72 L. J. Ch. 138, C. A. Comp. *Re Haslam*, [1902] 1 Ch. 765; 71 L. J. Ch. 734, C. A.

(*u*) *Tyars v. Alsop* (1888), 59 L. T. 367, C. A.

(*x*) *Parfitt v. Lawless* (1872), L. R. 2 P. 462; 41 L. J. P. 68; *Walker v. Smith* (1861), 29 Beav. 394; *Hindson v. Weatherill* (1854), 23 L. J. Ch. 820; 5 De G. M. & G. 301; *Barry v. Bullin* (1838), 2 Moo. P. C. 480, P. C.

(*y*) *Hunter v. Atkins* (1832), 3 Myl. & K. 113.

(*z*) *Robb v. Green*, [1895] 2 Q. B. 315; 64 L. J. Q. B. 593, C. A.; *Louis v. Smellie* (1895), 73 L. T. 226, C. A.; *Lamb v. Evans*, [1893] 1 Ch. 218; 62 L. J. Ch. 404, C. A.; *Liverpool Victoria, etc., Socy. v. Houston* (1901), 3 F. 42; *Kirchner v. Gruban*, [1909] 1 Ch. 413; 78 L. J. Ch. 117; *Amber Size, etc., Co. v. Menzel*, [1913] 2 Ch. 239; 82 L. J. Ch. 573.

(*a*) *Makepeace v. Rogers* (1865), 34 L. J. Ch. 396; 4 De G. J. & S. 649; *Hemings v. Pugh*

agency transaction untainted with fraud (b), or where the agency is not of a fiduciary character, the agent is not bound to render an account in a Court of equity, unless the accounts are so complicated that they cannot be properly investigated in an action at law (c).

Settled accounts will not be re-opened (d), unless the agent has been guilty of fraud or undue influence, but the principal may be given leave to surcharge and falsify them (e). Where the agent has been guilty of fraud (f), or the accounts have been settled under undue influence (g), his accounts will be re-opened from the commencement of the agency, and in such a case lapse of time does not constitute a defence (f).

The illegality of a transaction entered into by an agent is not a bar to an action by the principal for an account thereof (h), unless the contract of agency is itself unlawful (i).

The maxim *ex turpi causa, non oritur actio* applies as between principal and agent; and where the principal has paid money to the agent in pursuance of an agreement between them that the agent shall apply it to an illegal purpose, the principal cannot recover the money, after the time agreed for performance by the agent has passed, even though the agent has converted the money to his own use (k).

The right of a principal to have an account taken in equity rests upon the trust and confidence reposed in the agent (l), and in all cases of general agency, the fiduciary character of the relationship is sufficient to support an action for an account, whether the accounts be complicated or not, and even if the receipts and payments be all on the one side (m). Thus, where an agent is employed to sell property, he may be compelled to account in equity for the proceeds (n). But the bare relationship of principal and agent is not

(1863), 4 Giff. 456; *Bowles v. Orr* (1835), 1 Y. & Coll. 464; *Finch v. Burden* (1865), 12 L. T. 302.

(b) *Navulshaw v. Brownrigg* (1852), 21 L. J. Ch. 908; 2 De G. M. & G. 441; *Phillips v. Phillips* (1852), 22 L. J. Ch. 141; 9 Hare, 471.

(c) *Barry v. Stevens* (1862), 31 L. J. Ch. 785; 31 Beav. 258; *Hemings v. Pugh* (1863), 4 Giff. 456; *King v. Rossett* (1827), 2 Y. & J. 33; *Blyth v. Whiffin* (1872), 27 L. T. 330.

(d) *M'Kellar v. Wallace* (1853), 5 Moo. Ind. App. 372, P. C.; *Parkinson v. Hanbury* (1867), L. R. 2 H. L. 1; 36 L. J. Ch. 293.

(e) *Hunter v. Belcher* (1864), 2 De G. J. & S. 194; *Mozeley v. Cowie* (1877), 47 L. J. Ch. 271.

(f) *Beaumont v. Boulthbee* (1802), 5 Ves. 485; 7 Ves. 599; *Clarke v. Tipping* (1846), 9 Beav. 284; *Middleditch v. Sharland* (1799), 5 Ves. 87; *Hardwicke v. Vernon* (1808), 14 Ves. 504; 9 R. R. 329; *Walsham v. Stainton* (1863), 12 W. R. 63.

(g) *Watson v. Rodwell* (1879), 11 Ch. D. 150; 48 L. J. Ch. 209, C. A.; *Coleman v. Mellersh* (1850), 2 Mac. & G. 309; *Lewes v. Morgan* (1817), 5 Price, 42; *Jones v. Moffett* (1846), 3 J. & L. 636; *Ward v. Sharp* (1883), 53 L. J. Ch. 313.

(h) *Sharp v. Taylor* (1850), 2 Ph. 801; 78 R. R. 298; *Williams v. Trye* (1854), 23 L. J. Ch. 860.

(i) *Knowles v. Houghton* (1805), 11 Ves. 168; *Battersby v. Smyth* (1818), 3 Madd. 110; *Sykes v. Beadon* (1879), 11 Ch. D. 170.

(k) *Harry Parker, Ltd. v. Mason*, [1940] 2 K. B. 598, C. A. It matters not that the agent has falsely and fraudulently represented to the principal that the agent has the means of carrying out the illegal purpose (*ibid.*).

(l) *Padwick v. Stanley* (1852), 9 Hare, 627.

(m) See note (a), above.

(n) *Mackenzie v. Johnston* (1819), 4 Madd. 373.

sufficient, in the absence of fraud, where the agent is not employed in a fiduciary capacity, and the transaction can be fairly and properly investigated in a common law action (o). Thus, bankers are not bound to account in equity to their customers, unless the accounts in question are intricate and complicated (p). So, it was held that a person who was occasionally employed as a clerk by a solicitor was not bound to account in equity, though there had been mutual receipts and payments (q). Damages for neglect of duty cannot be passed in taking an account, the proper remedy for such damages being an action at law (r).

In cases of fraud or undue influence, accounts long since settled will be re-opened from the commencement of the agency. Proof of one fraudulent overcharge has been held sufficient to entitle the principal to have the agent's accounts re-opened for a period of twenty years (s). So, where there were incorrect entries, and amounts unexplained and unaccounted for, in the accounts of a deceased agent of a company, who was also a large shareholder in the company, his accounts were re-opened after his death, for a period of twenty-five years (t).

Statute of Limitations.—By the Limitation Act, 1929 (u), s. 2 (2), an action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action. By section 19, no period of limitation prescribed by the Act applies to an action, by a beneficiary under a trust, in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy, or to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or received by him and converted to his use; but, subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust (apart from any other limitation provided by the Act) may not be brought after six years from accrual of the right of action.

Article 55.

DUTY TO ACCOUNT FOR ALL SECRET PROFITS.

No agent is permitted to acquire any personal benefit in the course of, or by means of, his agency without the knowledge and consent of the principal (x).

Every agent must account to his principal for every benefit, and pay over to the principal every profit, acquired by him in the course of, or by means of, the agency without such knowledge

(o) See note (c), *ante*, p. 91.

(p) *Foley v. Hill* (1848), 2 H. L. Cas. 28; affirming 13 L. J. Ch. 182.

(q) *Fluker v. Taylor* (1855), 3 Drew. 183.

(r) *G. W. Ins. Co. v. Cunliffe* (1874), L. R. 9 Ch. 525; 43 L. J. Ch. 741.

(s) *Williamson v. Barbour* (1877), 9 Ch. D. 529; 50 L. J. Ch. 147.

(t) *Stainton v. Carron Co.* (1857), 27 L. J. Ch. 89; 24 Beav. 346.

(u) 2 & 3 Geo. 6, c. 21.

(x) *Parker v. McKenna* (1874), L. R. 10 Ch. 96; 44 L. J. Ch. 425; *Morison v. Thompson* (1874), L. R. 9 Q. B. 480; 43 L. J. Q. B. 215; *Imp. Mercantile Credit Co. v. Coleman* (1873), L. R. 6 H. L. 189; 42 L. J. Ch. 664; *Smith v. Lay* (1856), 3 Kay & J. 105; *Cohen v. Kushke* (1900), 83 L. T. 102. And see Illustrations.

and consent (x), even if, in acquiring the benefit or profit, he incurred a risk of loss (y), and the principal suffered no injury thereby (z):

Where a principal knows that his agent will receive remuneration from third persons in the course of the agency, and acquiesces in his so doing under a misapprehension as to the extent of the remuneration, such remuneration is not a benefit or profit acquired without the consent of the principal within the meaning of this Article, unless the agent misinformed or intentionally misled him as to the extent thereof, or, knowing that he laboured under such a misapprehension, neglected to correct it (a).

Illustrations.

1. An agent purchases a debt due from his principal to a third person. He is only entitled to recover from his principal the amount he actually paid for the debt (b).

2. A barrister who was employed as a legal adviser and confidential agent, having acquired a knowledge of the extent of his client's property and liabilities, purchased certain charges on the client's estates for less than their nominal value, after he had ceased to act for the client. Held, that he was only entitled to recover from the client the amount actually paid for the charges, with interest, he having purchased them without the consent of the client (c). The employment of a person in such a capacity disables him from purchasing any such charges, or otherwise obtaining a personal benefit in the course of his employment, except with the principal's permission, and the disability continues for so long after the fiduciary relation has ceased as the reasons on which it is founded continue to operate (c).

3. A consigned a ship to B for sale at a minimum price. B, with A's consent, employed C to sell the ship. C, being unable to find a purchaser, bought the ship himself at the minimum price without the consent of A, and subsequently resold her at a large profit. Held, that C must account to A for the profit (d). So, where a sub-agent, employed to procure an advance, received a secret commission from the persons making the advance, it was held that he was accountable for such commission to the principal (e). A broker who is instructed to buy shares at a certain price must account for the profit if he obtain the shares at less than that price (f). Where an agent

(z) See previous page.

(y) *Williams v. Stevens* (1866), L. R. 1 P. C. 352; 36 L. J. P. C. 21; *Burrell v. Mossop* (1888), 4 T. L. R. 270, C. A.

(z) *Parker v. McKenna* (1874), L. R. 10 Ch. 96; 44 L. J. Ch. 425; *Tarkwa Main Reef v. Merton* (1903), 19 T. L. R. 367.

(a) Illustration 16. See also *Holden v. Webber* (1860), 29 Beav. 117.

(b) *Reed v. Norris* (1837), 3 My. & C. 361, 374; 6 L. J. Ch. 197.

(c) *Carter v. Palmer* (1841), 8 Cl. & F. 657; 54 R. R. 145, H. L.; *Hobday v. Peters* (1860), 29 L. J. Ch. 780; 28 Beav. 349. And see *Patten v. Hamilton*, [1911] 1 Ir. R. 46, C. A.

(d) *De Bussche v. Alt* (1877), 8 Ch. D. 286; 47 L. J. Ch. 381, C. A. And see *Barker v. Harrison* (1846), 2 Coll. 546.

(e) *Powell v. Jones*, [1905] 1 K. B. 11; 74 L. J. K. B. 115, C. A.

(f) *Thompson v. Meade* (1891), 7 T. L. R. 698. Comp. *Platt v. Rowe* (1909), 26 T. L. R. 49 (agreement with principal that agent should take the profit as remuneration).

makes a secret profit in the course of his employment, and there are no accounts remaining to be taken between him and his principal, he is bound to pay over such profit as money had and received to the use of the principal (*g*).

4. A partner, in negotiating the transfer of a lease on behalf of the firm, stipulated for a personal benefit. Held, that he must account to the firm for the value of the benefit received (*h*).

5. The trustee of a will, who was a stockbroker's clerk, instructed the firm by which he was employed to value securities of the estate and, according to a previous agreement with the firm, received part of the firm's remuneration as his commission. Held, he must account to the estate for the amount so received (*i*).

6. A, having bought certain shares at £2 each, and knowing that B desired to purchase some, represented to B that he could obtain them at £3 or less, and asked B to authorise him to buy at £3. B gave him the authority. A then transferred his own shares to B at £3 each, representing that C was the vendor. Held, that A must account to B for the profit of £1 per share (*k*).

7. A requested B to provide an outfit for A's son. B did so, and obtained certain discounts, but charged A the full prices. The discounts were disallowed, although B did not charge any commission as an agent (*l*).

8. A shipmaster, being authorised to employ his vessel to the best advantage, and being unable to procure remunerative freight, loaded her with a cargo of his own. Held, that he must account to the owners for the profit made by the sale of the cargo, and not merely for reasonable freight (*m*).

9. The managing owner of a ship, being a provision merchant, furnishes supplies for the ship. He is only entitled to charge cost prices, unless the other part-owners, with full knowledge of the circumstances, consent to pay profit prices (*n*).

10. Commission agents, who are also merchants, are employed to ship and sell goods abroad. They do so, and purchase other goods with the proceeds. They are not bound to account for the profit on the sale of the goods bought with the proceeds, because such profit is not made in the course or by means of the agency. They are only bound to account for the proceeds of the goods sold on the principal's behalf (*o*).

11. A, a stockbroker, buys shares upon B's instructions. B fails to carry out the contract, so that A is justified in selling the shares against him. A has a fair price fixed by a jobber, and sells, and on his own account repurchases, the shares at that price. If, by reason of the sale and repurchase being

(*g*) *Morison v. Thompson* (1874), L. R. 9 Q. B. 480; 43 L. J. Q. B. 215.

(*h*) *Fawcett v. Whitehouse* (1829), 4 L. J. (o.s.) Ch. 64; 1 Russ. & M. 132; 32 R. R. 163. See also *Featherstonhaugh v. Fenwick* (1811), 17 Ves. 298; 11 R. R. 78.

(*i*) *Williams v. Barton*, [1927] 2 Ch. 9; 96 L. J. Ch. 355.

(*k*) *Kimber v. Barber* (1872), L. R. 8 Ch. 56.

(*l*) *Turnbull v. Garden* (1869), 20 L. T. 318. See also *Hippisley v. Knee*, [1905] 1 K. B. 1; 74 L. J. K. B. 68.

(*m*) *Shallcross v. Oldham* (1862), 2 Johns. & H. 609.

(*n*) *Ritchie v. Couper* (1860), 28 Beav. 344; cf. *Sherrard v. Barron*, [1923] 1 Ir. R. 21, C. A. (Ir.). See also *Williamson v. Hine*, [1891] 1 Ch. 390; 60 L. J. Ch. 123.

(*o*) *Kirkham v. Peel* (1881), 43 L. T. 171; 44 L. T. 195, C. A.

effected in one transaction, A was enabled to buy the shares at a lower price than he could have bought them at in the market in the ordinary way, he must account to B for the difference (p).

12. A solicitor, who was retained by A to act for him in negotiations for the purchase of a patent, had previously received a commission note from the owner of the patent agreeing to pay him commission in the event of a purchaser being found. A purchased the patent, and the solicitor, with A's knowledge, received the commission from the seller. Held, that he was not accountable to A for the commission, having made full disclosure (q).

Directors and Officers of Companies (r).

13. The directors of a company, on the transfer of the business to another company, receive from the transferees, without the knowledge of the transferors, a large sum by way of compensation. They must pay over such sum to the first-mentioned company (s). Neither directors nor officers of a company are permitted to retain any pecuniary benefits acquired in the conduct of the company's business, unless the particulars of such benefits are fully explained to, and are approved of by, the shareholders (t). Nor does a clause in the articles of association providing that directors shall not be accountable to the company for any profits realised, by reason only of their holding that office or of the fiduciary relation thereby established, absolve directors who are also vendors to the company from liability to refund any profits in respect of the sale, of which they have not made a full and explicit disclosure (u).

14. A director of a company, established for acquiring and working ships, with the consent of his co-directors, but without the knowledge of the shareholders, undertook the office of ship's husband. Held, that he must refund to the company, with interest, all moneys received by him for commission and brokerage as ship's husband (x). So, a solicitor, who is a

(p) *Erskine v. Sachs*, [1901] 2 K. B. 504; 70 L. J. K. B. 978, C. A.

(q) *Re Haslam*, [1902] 1 Ch. 765; 71 L. J. Ch. 734, C. A.

(r) Promoters of a company are not allowed to make secret profits in their dealings with the company. See *Erlanger v. New Sombbrero Phosphate Co.* (1878), 3 App. Cas. 1218; 48 L. J. Ch. 73, H. L.; *Bagnall v. Carlton* (1877), 6 Ch. D. 371; 47 L. J. Ch. 30, C. A.; *Lydney Iron Ore Co. v. Bird* (1886), 33 Ch. D. 85; 55 L. J. Ch. 875, C. A.; *Emma Silver Mining Co. v. Lewis* (1879), 4 C. P. D. 396; 48 L. J. C. P. 257; *Same v. Grant* (1877), 11 Ch. D. 918; *Whaley Bridge Calico Co. v. Green* (1879), 5 Q. B. D. 109; 49 L. J. Q. B. 326; *Hichens v. Congreve* (1831), 4 Sim. 420; *Re Sale Hotel, etc., ex p. Hesketh* (1898), 78 L. T. 368, C. A.; *Lagunas Nitrate Co. v. Lagunas Syndicate*, [1899] 2 Ch. 392, C. A.; *Re Lady Forrest Gold Mine*, [1901] 1 Ch. 582; 70 L. J. Ch. 275; *Re Leeds, etc., Theatre of Varieties*, [1902] 2 Ch. 809; 72 L. J. Ch. 1, C. A.; *Omnium Electric Palaces v. Baines*, [1914] 1 Ch. 332; 83 L. J. Ch. 372, C. A.; *Jubilee Cotton Mills v. Lewis*, [1924] A. C. 958; 93 L. J. Ch. 414, H. L.

(s) *Gaskell v. Chambers* (1858), 28 L. J. Ch. 385; 26 Beav. 360.

(t) *General Exchange Bank v. Horner* (1869), L. R. 9 Eq. 490; *York, etc., Ry. v. Hudson* (1853), 22 L. J. Ch. 529; 16 Beav. 485; 96 R. R. 228; *Ex p. Hill* (1862), 32 L. J. Ch. 154; *Mann v. Edinburgh Tramways Co.* (1892), 9 T. L. R. 102, H. L.; *Re Oxford Building Society* (1886), 35 Ch. D. 502; 56 L. J. Ch. 98; *Kaye v. Croydon Tramways Co.*, [1898] 1 Ch. 358; 67 L. J. Ch. 222, C. A.; *Gluckstein v. Barnes*, [1900] A. C. 240; 69 L. J. Ch. 385, H. L.; *Shaw v. Holland*, [1900] 2 Ch. 305; 69 L. J. Ch. 621, C. A. Comp. *Re Dover Coalfield Extension, Ltd.*, [1908] 1 Ch. 65; 77 L. J. Ch. 94, C. A.

(u) *Gluckstein v. Barnes*, [1900] A. C. 240; 69 L. J. Ch. 385, H. L. Comp. *Costa Rica Ry. v. Forwood*, [1901] 1 Ch. 746; 70 L. J. Ch. 385, C. A.

(x) *Benson v. Heathorn* (1842), 1 Y. & Coll. C. C. 326.

director, is not permitted to receive any remuneration for his services, professional or otherwise, unless such remuneration is sanctioned by resolution of the shareholders (y).

15. A agreed to become a director of a company on condition that the promoters indemnified him in respect of the amount paid for qualification shares. A afterwards resigned, and the promoters, in pursuance of the agreement, purchased the shares (which had become valueless) from him at the original price. Held, that A must account to the company for the value of the indemnity constituted by his secret agreement with the promoters—i.e., for the original price of the shares (z). So, where the first five directors of a company, being bound each to hold twenty qualification shares, accepted that number from the promoter with the knowledge and approval of each other, it was held that they were jointly and severally liable to pay to the liquidator of the company the original value of such shares (a).

16. *Misapprehension as to extent of remuneration.*—It is usual for underwriters to allow insurance brokers, for punctual payment of premiums, ten per cent. cash discount, or twelve per cent. calculated on the yearly profits, in addition to the ordinary commission of five per cent. on each re-insurance. A company, having made no inquiry as to the remuneration paid by the underwriters, and not being aware of the twelve per cent. allowance, employed an insurance agent to negotiate its business. After the agent (who received no remuneration from the company) had been paid the usual allowance of twelve per cent. for more than eight years, the company discovered it and claimed to have it paid over to them as secret profit. It was held that they were not entitled to recover (b). This decision has been followed by the Court of Appeal in a later case, on the ground that every person who employs another as his agent with the knowledge that the agent receives remuneration from third persons, and who does not choose to inquire what the charges of the agent will be, must allow all the usual and customary charges of such an agent, and is not entitled to dispute them because he was not aware of the extent of the remuneration usually received by such agents (c).

Note.—In *Re Cape Breton Co.* (d), the Court of Appeal held that where an agent secretly sells to his principal goods which were the property of the agent before the commencement of the agency, and the principal declines to rescind the contract, or rescission has become impossible, the agent cannot, in the absence of misrepresentation (e), be called upon to account for the

(y) *North Eastern Ry. Co. v. Jackson* (1870), 19 W. R. 198.

(z) *Re North Australian Territory Co., Archer's Case*, [1892] 1 Ch. 322, C. A.

(a) *Re Carriage Supply Association* (1884), 27 Ch. D. 322; 53 L. J. Ch. 1154.

(b) *Great Western Insurance Co. of New York v. Cunliffe* (1874), L. R. 9 Ch. 525. See also *Norreys v. Hodgson* (1897), 13 T. L. R. 421, C. A. (agent to procure loan from insurance company, which required a policy on the life of the principal, held entitled to retain commission on the policy).

(c) *Baring v. Stanton* (1876), 3 Ch. D. 502, C. A. *Comp. Queen of Spain v. Parr* (1869), 39 L. J. Ch. 73; *Green v. Tughan* (1913), 30 T. L. R. 64.

(d) (1884), 26 Ch. D. 221; 29 Ch. D. 795, C. A.; and see *Ladywell Mining Co. v. Brookes*, *Same v. Huggons* (1887), 35 Ch. D. 400; 56 L. J. Ch. 684, C. A.; *Re Lady Forrest Gold Mine*, [1901] 1 Ch. 582; 70 L. J. Ch. 275.

(e) See *Hichens v. Congreve* (1831), 4 Sim. 420; *Re Leeds, etc., Theatre of Varieties*, [1902] 2 Ch. 809; 72 L. J. Ch. 1, C. A.; Article 52, Illustration 1.

profit made by him upon the transaction, or for the difference between the contract price and the market value (f). This decision has been approved by the Judicial Committee of the Privy Council in *Burland v. Earle* (g), where a director, not purporting to act for the company and in circumstances not making him a trustee for the company, purchased property, and subsequently sold it to the company at an enhanced price, without disclosing the profit, and it was held that, whether or not the company was entitled to rescind the transaction, it was not entitled to affirm it and claim the profit.

DUTIES OF PARTICULAR CLASSES OF AGENTS.

1. Factors.

It is the duty of a factor—

- (1) to give his principal the free and unbiased use of his judgment and discretion (h);
- (2) to act in person, unless authorised to delegate his authority (i);
- (3) to keep and render just and true accounts (h);
- (4) to keep the property of the principal separate from his own and from that of other persons (h);
- (5) to keep each sale distinct and separate from other transactions (k);
- (6) to account for goods sold, pay over the proceeds, and deliver unsold goods to the principal, on demand (l);
- (7) to keep goods intrusted to him for sale with as much care as would be taken by a prudent man in respect of his own goods (m), and not to barter (n) or pledge them (o) unless expressly authorised to do so;
- (8) to insure goods consigned to him, if instructed to do so, or if he has been in the habit of doing so (p);
- (9) not to purchase the principal's goods for himself, without full and fair disclosure (q).

2. Brokers.

It is the duty of a broker—

- (1) to contract in the name of his principal, subject to any special instructions or usage to the contrary (r);
- (2) to execute contracts in such a way as to be legally binding on both parties (s), and so as to give each party a right to sue thereon (t);

(f) On appeal to the House of Lords, *sub nomine Cavendish Bentinck v. Fern* (1887), 12 App. Cas. 652, the decision was affirmed on other grounds.

(g) [1902] A. C. 83; 71 L. J. P. C. 1. Cp. *Cook v. Deeks*, [1916] 1 A. C. 554; 85 L. J. P. C. 181, P. C.

(h) *Clarke v. Tipping* (1846), 9 Beav. 284; *Gray v. Hail* (1854), 20 Beav. 219; 109 R. R. 396. (i) *Cockran v. Irlam* (1813), 2 M. & S. 301. And see Article 42.

(k) *Guerreiro v. Peile* (1820), 2 B. & A. 616.

(l) *Topham v. Braddick* (1809), 1 Taunt. 572.

(m) *Coggs v. Bernard*, 2 Ld. Raym. 909, 918.

(n) *Guerreiro v. Peile* (1820), 3 B. & A. 616.

(o) *Martini v. Coles* (1813), 1 M. & S. 140; *Gill v. Kymer* (1821), 5 Moo. 503; *Fielding v. Kymer* (1821), 2 B. & B. 639. (p) *Smith v. Lascelles* (1788), 2 T. R. 187.

(q) *Clarke v. Tipping* (1846), 9 Beav. 284.

(r) *Baring v. Corrie* (1818), 2 B. & A. 137. See Article 41, Illustration 8.

(s) *Grant v. Fletcher* (1826), 5 B. & C. 436. (t) Article 41, Illustrations 9 and 10.

- (3) to inform his principal of the terms of any contract made on his behalf (*u*);
- (4) to comply with statutory provisions, in entering into contracts, notwithstanding a custom amongst brokers to disregard such provisions (*x*);
- (5) to make a careful estimate of the value of goods which he is instructed to sell, so that he may not sell them for less than their value (*y*);
- (6) to exercise his skill and fairly communicate his opinion to his principal (*z*);
- (7) not to deliver goods sold by him, except in accordance with the terms of sale (*a*);
- (8) not to sell his own property to his principal, nor buy the principal's property himself, without full and fair disclosure (*b*).

It is not part of his duty, in the absence of a special contract or custom, to examine goods bought by him, for the purpose of ascertaining whether they are of the quality bought (*c*).

3. Shipmasters (*d*).

It is the duty of a shipmaster to give the whole of his time to the service of his principal, and therefore not to trade on his own account (*e*), nor give any portion of his personal services to another (*f*). A custom for shipmasters to trade on their own account is, apparently, unlawful (*e*).

4. Auctioneers.

It is the duty of an auctioneer—

- (1) to act in person (*g*);
- (2) to sell for ready money only, in the absence of instructions to the contrary (*h*);
- (3) to disclose his principal (*i*);
- (4) to use due diligence in requiring that the deposit be duly paid (*k*), and if it be paid to him, to hold it as stakeholder until the completion of the transaction (*l*);

(*u*) *Johnson v. Kearley*, [1908] 2 K. B. 514; 77 L. J. K. B. 904, C. A. And see Article 72, Illustration 12.

(*z*) *E.g.*, The Banking Companies (Shares) Act, 1867 ("Leeman's Act") (30 & 31 Vict. c. 29); *Neilson v. James* (1882), 9 Q. B. D. 546; 51 L. J. Q. B. 369, C. A.

(*y*) *Solomon v. Barker* (1862), 2 F. & F. 726.

(*x*) *Ex p. Dyster* (1816), 2 Rose 349.

(*a*) *Boorman v. Brown* (1842), 11 C. & F. 1.

(*b*) *Wilson v. Short* (1847), 6 Hare, 366; *Tetley v. Shand* (1872), 25 L. T. 658; *Rothschild v. Brookman* (1831), 2 Dow. & Cl. 188, H. L.; *Ex p. Huth, re Pemberton* (1840), Mont & Ch. 667. See, however, Article 71, Illustration 13.

(*c*) *Zwischenbart v. Alexander* (1860), 1 B. & S. 234; 30 L. J. Q. B. 254, Ex. Ch.

(*d*) For the authority of shipmasters as agents of necessity, see pp. 64—68, *ante*.

(*e*) *Gardner v. M' Culcheon* (1842), 4 Beav. 534.

(*f*) *Thompson v. Havelock* (1808), 1 Camp. 527.

(*g*) *Coles v. Trecothick* (1804), 9 Ves. 234. Every person who acts as an auctioneer must take out a licence under the Auctioneers Act, 1845 (8 & 9 Vict. c. 15), s. 4.

(*h*) *Ferrers v. Robbins* (1835), 2 C. M. & R. 152; *Sykes v. Giles* (1839), 5 M. & W. 645; 9 L. J. Ex. 106.

(*i*) *Franklyn v. Lamond* (1847), 16 L. J. C. P. 221; 4 C. B. 637.

(*k*) *Hibbert v. Bayley* (1860), 2 F. & F. 48; *Andrade v. Sotheby* (1931), 47 T. L. R. 244.

(*l*) *Gray v. Gutteridge* (1827), 3 C. & P. 40; *Yates v. Farebrother* (1819), 4 Madd. 239; *Burrough v. Skinner* (1770), 5 Burr. 2639.

- (5) to sell to a third person (*m*);
- (6) to accept the highest *bona fide* bid, where he sells without reserve, notwithstanding express instructions from his principal to the contrary (*n*);
- (7) to account for the proceeds of goods sold, to the person from whom he received them (*o*);
- (8) not to deliver goods sold until paid for, nor allow any deduction from the price, unless authorised to do so by the principal (*p*);
- (9) if appointed to conduct a sale by the Court, to pay into Court, or to the solicitors of the vendors for payment into Court, any money received by him (*q*).

5. Solicitors.

It is the duty of a solicitor--

- (1) to obey the express instructions of his client, notwithstanding counsel's advice to the contrary (*r*);
- (2) to give his clients the benefit of his personal superintendence and judgment (*s*);
- (3) to know and observe the rules of practice and procedure in the Courts (*t*);
- (4) to keep a record of his transactions with his clients (*u*);
- (5) to check useless litigation (*x*), and before instituting proceedings, especially on behalf of a wife against her husband, carefully to ascertain the facts of the case and consider whether there is a reasonable prospect of success (*y*);
- (6) to communicate to his client any offers of compromise made to him in the course of conducting a suit (*z*);
- (7) to keep secret all confidential communications made to him, and all

(*m*) *Oliver v. Court* (1820), Dan. 301.

(*n*) *Warlow v. Harrison* (1858), 29 L. J. Q. B. 14; 1 El. & El. 295, 309; 117 R. R. 219, Ex. Ch.; *Bezwil v. Christie* (1776), Cowp. 395.

(*o*) *Crosskey v. Mills* (1834), 1 C. M. & R. 298; *Crowther v. Elgood* (1887), 34 Ch. D. 691; 56 L. J. Ch. 416, C. A.; *Parsons v. Dewsbury* (1887), 3 T. L. R. 354, C. A.

(*p*) *Brown v. Stalon* (1816); 2 Chit. 353.

(*q*) *Biggs v. Bree* (1882), 51 L. J. Ch. 64, 263, C. A.; *Brown v. Farebrother* (1888), 58 L. J. Ch. 3.

(*r*) *Fray v. Voules* (1859), 1 El. & El. 839; 28 L. J. Q. B. 232; 117 R. R. 483; *Butler v. Knight* (1867), L. R. 2 Ex. 109; 36 L. J. Ex. 66.

(*s*) *Hopkinson v. Smith* (1822), 1 Bing. 13; but see *Myers v. Rothfield* (1938), 54 T. L. R. 1045, C. A. As to the position of a solicitor acting for a client who is insured under a policy which gives control of proceedings to the insurance company: see *Re Crocker*, [1936] Ch. 696; 105 L. J. Ch. 276; *Groom v. Crocker*, [1939] 1 K. B. 194; 108 L. J. K. B. 296, C. A.

(*t*) *Godefroy v. Dalton* (1830), 6 Bing. 460. When instructed to make a claim against a public authority he must bear in mind the provisions of the Limitation Act, 1939 (2 & 3 Geo. 6, c 21), s. 21: *Fletcher v. Jubb*, [1920] 1 K. B. 275, C. A.

(*u*) *Ex p. Swinfanks, re Shanks* (1879), 11 Ch. D. 525; 48 L. J. Bkey. 120, C. A.
(*x*) *Ottley v. Gilby* (1845), 14 L. J. Ch. 177; 8 Beav. 602; *Re Clarke* (1851), 21 L. J. Ch. 20; 1 De G. M. & G. 43.

(*y*) *Re Hooper, Baylis v. Watkins* (1864), 33 L. J. Ch. 300; *Walker v. Walker* (1897), 76 L. T. 234; *Beer v. Beer* (1906), 22 T. L. R. 367.

(*z*) *Sill v. Thomas* (1839), 8 C. & P. 762.

- information and knowledge of his client's affairs acquired by him, in the course of his employment as solicitor (a);
- (8) not to act for the opponent of his client, or of a former client, in any case in which his knowledge of the affairs of such client or former client will give him an undue advantage (b). An injunction will be granted to restrain a solicitor from communicating to the opponent of a former client confidential communications made to him, or documents or facts coming to his knowledge, as the solicitor of the former client (b); and when there is a chance of his using any such communications or knowledge to the detriment of the former client, from acting as solicitor for the opponent (b). In the application of this principle it is quite immaterial whether the solicitor was discharged by his former client, or ceased to act for him voluntarily (b);
- (9) to continue, until its termination, the conduct of any cause undertaken by him, unless there is good reason to abandon it (e.g., the failure of the client, after reasonable notice, to supply him with funds for out-of-pocket expenses), and when there is such good reason, to give his client reasonable notice of his intention to abandon the cause (c);
- (10) not to bargain for nor accept any gift or reward from his client during the continuance of his employment, beyond the amount of his proper professional remuneration (d);
- (11) not to employ counsel, nor incur other unusual expenses, when the fees or expenses are not taxable as between party and party, without explaining to the client that such fees or expenses are not recoverable from the other side even in the event of success (e);
- (12) if he prepare a deed in which he takes a personal interest, to insert all the usual clauses and explain fully to the client the effect of the deed (f);
- (13) if he contract with a client, to explain fully the transaction and

(a) *Davies v. Clough* (1836), 6 L. J. Ch. 113; 8 Sim. 262; *Biggs v. Head* (1837), Sau. & Sc. 335; *Taylor v. Blacklow* (1836), 3 Scott, 614.

(b) *Lewis v. Smith* (1848), 1 Mac. & G. 417; *Hutchins v. Hutchins* (1825), 1 Hog. 315; *Davies v. Clough*, *supra*; *Cholmondeley v. Clinton* (1815), 19 Ves. 261; *Biggs v. Head* (1837), Sau. & Sc. 335, and cases reported in notes thereto. Comp. *Johnson v. Marriott* (1833), 2 C. & M. 183; *Griessell v. Petro* (1832), 9 Bing. 1; *Parratt v. Parratt* (1848), 2 De G. & Sm. 258; *Hutchinson v. Newark* (1850), 3 De G. & Sm. 727; *Robinson v. Mullett* (1817), 4 Price, 353; *Rakusen v. Ellis*, [1912] 1 Ch. 831; 81 L. J. Ch. 409, C. A., overruling *Little v. Kingwood Collieries Co.* (1882), 20 Ch. D. 733; 51 L. J. Ch. 498.

(c) *Nicholls v. Wilson* (1843), 12 L. J. Ex. 266; 11 M. & W. 106; *Harris v. Osbourn* (1834), 3 L. J. Ex. 182; 2 C. & M. 629; *Whitehead v. Lord* (1852), 7 Ex. 691; 21 L. J. Ex. 239; *Van Sandau v. Browne* (1832), 2 L. J. C. P. 34; 9 Bing. 402; *Hoby v. Buist* (1832), 1 L. J. K. B. 121; 3 B. & Ad. 350; *Wadsworth v. Marshall* (1832), 2 C. & J. 665; 37 R. R. 810; *Underwood v. Lewis*, [1894] 2 Q. B. 306; 64 L. J. Q. B. 60, C. A. Article 69, Illustration 3.

(d) *O'Brien v. Lewis* (1863), 32 L. J. Ch. 569. See Article 52, Illustration 14.

(e) *Foy v. Cooper* (1842), 2 Q. B. 937; *Re Broad* (1885), 15 Q. B. D. 420; 54 L. J. Q. B. 573, C. A.

(f) *Cockburn v. Edwards* (1881), 18 Ch. D. 449; 51 L. J. Ch. 46, C. A.; *Willis v. Barron*, [1902] A. C. 171; 71 L. J. Ch. 609, H. L. This principle applies also to counsel: *Segrave v. Kirwan* (1828), Beat. 157.

make a full disclosure of everything known to him respecting the subject-matter (g);

- (14) if he receive the deposit at a sale by auction, to pay it over to his client on demand, and not retain it as a stakeholder (h), unless the conditions of sale provide that he shall so retain it;
- (15) if he act as the independent adviser of a person about to make a gift to, or voluntary settlement upon, a person occupying a fiduciary position towards his client, to satisfy himself that his client understands and desires to carry out the transaction, and that the gift or settlement is one which it is right and proper, in all the circumstances, for him to make; and if he be not so satisfied, to advise his client accordingly, and to refuse to act further in the transaction in the event of the client insisting, contrary to such advice, upon carrying it out (i). In such a case, the solicitor ought not to act for the donee as well as the donor (i).

(g) *Pisani v. Gibraltar* (1874), L. R. 5 P. C. 516 P. C.; *Savery v. King* (1856), 5 H. L. Cas. 627; 25 L. J. Ch. 482; 101 R. R. 299; *Ward v. Sharp* (1883), 53 L. J. Ch. 313; *Luddy v. Peard* (1886), 33 Ch. D. 500; 55 L. J. Ch. 884; *Prees v. Coke* (1871), L. R. 6 Ch. 645. And see Article 52, Illustrations 7, 8, 11 and 12.

(h) *Edgell v. Day* (1865), L. R. 1 C. P. 80; 35 L. J. C. P. 7.

(i) *Powell v. Powell*, [1900] 1 Ch. 243; 69 L. J. Ch. 164; *Wright v. Carter*, [1903] 1 Ch. 27; 72 L. J. Ch. 138, C. A. And see *Willis v. Barron*, [1902] A. C. 171; 71 L. J. Ch. 609, H. L.

CHAPTER IX.

LIABILITIES OF AGENTS TO THEIR PRINCIPALS.

Article 56.

IN RESPECT OF CONTRACTS ENTERED INTO ON BEHALF OF
THE PRINCIPAL.

EXCEPT in the case of insurance brokers, who are, by usage, personally liable to the underwriters for premiums payable under policies effected by them (a), no agent incurs any personal liability to his principal in respect of any contract entered into by him on the principal's behalf, and in pursuance of his authority, unless he was acting under a *del credere* commission (b), or acted as agent for both parties, and so contracted a personal liability (c). An agent who contracts under a *del credere* commission is personally responsible to the principal for the due performance of the contract by the other contracting party (d).

Illustration.

A stockbroker sells shares to a jobber on the Stock Exchange, and does not disclose the name of the buyer in the contract note sent to the principal. The buyer fails. There is no rule or custom by which the broker in such a case is personally liable to the principal for the price of the shares or for the due performance of the contract, and the broker incurs no such liability (e).

Article 57.

LIABILITY ON BILLS OF EXCHANGE SIGNED WITHOUT
QUALIFICATION.

Where an agent, in the course of the agency, signs a bill of exchange in his own name, without qualification, as drawer or indorser, and the principal becomes the holder of the bill, the question whether the agent is personally liable to the principal on the bill depends upon what was the real intention of the parties. If the agent intended to bind himself, or if, by signing without qualification, he led the principal to believe that such was his intention, and to act in a way in which he

(a) *Baker v. Langhorn* (1816), 6 Taunt. 519; *Lee v. Bullen* (1858), 27 L. J. Q. B. 161; 8 El. & Bl. 692, n.

(b) *Varden v. Parker* (1799), 2 Esp. 710; *Alson v. Sylvester* (1823), 1 C. & P. 107; *Risbourg v. Bruckner* (1858), 3 C. B. (N.S.) 812; 27 L. J. C. P. 90. Illustration 1.

(c) Article 116, Illustration 10.

(d) *Hornby v. Lacy* (1817), 6 M. & S. 166; *Morris v. Cleasby* (1816), 4 M. & S. 566.

(e) *Gill v. Shepherd* (1902), 8 Com. Cas. 48.

would not have acted but for such belief, the agent is liable to the principal on the bill. Otherwise, he is not so liable (*f*).

Thus, where a broker, who had no authority to draw bills on behalf of the principal, was employed to sell goods, and sold them for a bill at a given date, and drew on the purchaser for the amount, he was held liable to the principal on the bill, on the ground that his signature, as drawer, might have misled the principal and prevented him from making inquiries as to the solvency of the purchaser (*g*). So, where an agent who is instructed to purchase foreign bills for his principal, indorses such bills, intending to guarantee them, or indorses and sends his own bills in execution of the order, he is liable to the principal on the indorsement (*g*). But, where it is not intended that the agent shall be bound, the mere fact that he signs a bill without qualification does not render him liable to the principal, but only to third persons who become holders thereof in due course (*g*).

Article 58.

LIABILITY FOR NEGLIGENCE AND OTHER BREACHES OF DUTY.

Except in the case of counsel, who are under no liability to their clients for negligence or other breaches of duty in the course of their employment as such (*h*), every agent is liable to make good any legal damage suffered by his principal in consequence of the agent's negligence or other breach of duty in the course of the agency (*i*).

Provided that—

- (a) where an agent is clearly authorised to do any particular act, or to effect any particular transaction, he is not liable to the principal for any loss or injury suffered in consequence of the imprudent or improper nature of that act or transaction (*k*);
- (b) where an agent strictly follows the instructions of the principal (*l*), or, in the absence of express instructions, acts in accordance with usage and in the ordinary course of business (*m*), or upon the best advice he can obtain under the circumstances (*n*), or uses his

(*f*) *Castrique v. Buttigieg* (1855), 10 Moo. P. C. C. 94, P. C.; *Coupy v. Harden* (1816), 2 Marsh. 454; *Le Feuvre v. Lloyd* (1814), 1 Marsh. 318; *Kidson v. Dilworth* (1818), 5 Price, 564.

(*g*) See note (*f*), above.

(*h*) *Fell v. Brown* (1791), 1 Peake, 131; *Mulligan v. M'Donagh* (1860), 2 L. T. 136.

(*i*) See Illustrations and Article 142, Illustration 2. The Statute of Limitations runs in favour of the agent from the time of the act or omission constituting the breach of duty: *Wood v. Jones* (1889), 61 L. T. 551; *Bean v. Wade* (1885), 2 T. L. R. 157, C. A.; *Smith v. Foz* (1848), 6 Hare, 386; *Howell v. Young* (1826), 5 B. & C. 259; *Short v. M'Carthy* (1820), 3 B. & A. 626.

(*k*) Illustration 17.

(*l*) *Pariente v. Lubbock* (1855), 8 De G. M. & G. 5; *Warwicke v. Noakes* (1790), 1 Peake, 98.

(*m*) *Russell v. Hankey* (1794), 6 T. R. 12; *Lambert v. Heath* (1846), 15 M. & W. 496; *Moore v. Mourgue* (1776), Cowp. 479; *Nitrate Producers' S. S. Co. v. Wills* (1905), 21 T. L. R. 699. H. L. Illustrations 9, 10 and 16.

(*n*) *Miles v. Bernard* (1795), 2 Peake, 61.

best judgment in a matter of discretion (o), he is not liable to the principal for loss or injury resulting therefrom.

In this Article, negligence means the neglect or omission by an agent to exercise such a degree of skill, care and diligence as it is his duty to exercise (p).

Illustrations.

Disobedience to instructions.

1. A solicitor enters into a compromise on behalf of his client, notwithstanding express instructions from the client not to do so. He is liable to the client for damages, though the compromise was reasonable, and was entered into in good faith for the benefit of the client, and on the advice of the counsel engaged in the case (q).

2. An agent was instructed, and undertook, to warehouse certain goods at a particular place. He warehoused a portion of such goods at another place, where they were destroyed without negligence. Held, that the loss of the goods was a natural consequence of the agent's disobedience to instructions, and that he was liable to the principal for their value (r).

3. An agent, instructed to insure goods, neglects to do so. He is liable to the principal for their value if they be lost (s).

4. An outside broker was employed to buy shares on the stock exchange. He accepted the employment, and sent a bought note, but did not actually buy the shares. Held, that it was not a wagering contract, and that he was liable to pay damages for breach of duty (t).

Negligence and other breaches of duty.

5. An agent pays his principal's money into his own account at the bank, it being his duty to pay it into a separate account. He is responsible for the failure of the banker, though acting gratuitously (u).

6. A broker was authorised to sell and deliver certain goods. He contracted to sell them for cash on delivery. Held, that he was liable to the principal in damages for having delivered the goods without payment (x).

7. A broker is authorised to sell goods at a certain price. He sells them at a lower price. He is liable to the principal in damages for the breach

(o) *Comber v. Anderson* (1808), 1 Camp. 523; *Cullerne v. L. & S. Building Society* (1890), 25 Q. B. D. 485; 59 L. J. Q. B. 525, C. A.; *Chown v. Parrott* (1863), 14 C. B. (N.S.) 74; 32 L. J. C. P. 197; *Re Cobridge S. S. Co. and Bucknall S. S. Lines* (1910), 15 Com. Cas. 138, C. A.

(p) See Article 47, and Illustrations thereto. See also Illustrations 10, 16 and 20. As to negligence of solicitor, see *post*, p. 108.

(q) *Butler v. Knight* (1867), L. R. 2 Ex. 109; 36 L. J. Ex. 66; *Fray v. Voules* (1859), 1 El. & El. 839; 28 L. J. Q. B. 232; *The Hermoine*, [1922] P. 162; 91 L. J. P. 136.

(r) *Lilley v. Doubleday* (1881), 7 Q. B. D. 510; 51 L. J. Q. B. 310, C. A.

(s) *Smith v. Lascelles* (1788), 2 T. R. 187.

(t) *Re Hewitt, ex p. Paddon* (1893), 9 T. L. R. 166, C. A.

(u) *Wren v. Kirton* (1805), 11 Ves. 377; 8 R. R. 174; *Massey v. Banner* (1820), 1 Jac. & W. 241; 21 R. R. 150; *Robinson v. Ward* (1825), 2 C. & P. 59; *MacDonnell v. Harding* (1834), 4 L. J. Ch. 10; 7 Sim. 178; 40 R. R. 95.

(z) *Boorman v. Brown* (1842), 3 Q. B. 511; 11 C. & F. 1. And see *Kidd v. Horne* (1885), 2 T. L. R. 141.

of duty (y). So, a broker who sold goods by auction at much below their real value, not having made an estimate of the value in accordance with usage, was held liable in an action for negligence (z).

8. An auctioneer takes a bill of exchange in payment of the price of goods sold by him. He is liable to the principal for the amount, if the bill be dishonoured (a). So, where a house agent, who was instructed by a lessor not to part with a written licence (authorising an assignment of the lease) until the lessee had paid the rent due, accepted a cheque for the rent and gave up the licence to the lessee, and the cheque was dishonoured, the agent was held liable to the lessor for the full amount of the rent (b).

9. A London banker receives bills from a correspondent in the country, to be presented for payment. He gives up the bills to the acceptor, in exchange for a cheque for the amount, that being the usual and ordinary course amongst bankers. The cheque is dishonoured. The banker is not liable in an action for negligence, having acted in the ordinary course of business and in accordance with usage (c).

10. A contracted to lighter and load certain machinery, and pass it through the Custom House. It was common knowledge that import duties were about to be imposed on machinery, and A might have cleared it in time to escape the taxation, but did not do so, though he cleared it within the time prescribed by the Customs regulations. In an action against A for the amount of the duty paid, it was held that there was no evidence to go to the jury of any negligence or breach of duty for which he would be liable (d).

11. The directors of a company knowingly or negligently (e) pay dividends out of the capital. Such a payment is a misapplication of the funds of the company, and the directors are jointly and severally liable to repay the amount to the company, with interest (f). But they are not liable if the dividends were paid in reliance on information furnished by the officials of the company, on which in the ordinary course of business the directors were entitled to rely (g).

12. A solicitor, employed to procure a mortgage, discovers a defect in his client's title, which he afterwards discloses to another client, causing damage to the first-mentioned client. He is liable for the damage caused

(y) *Dufresne v. Hutchinson* (1810), 3 Taunt. 117.

(z) *Solomon v. Barker* (1862), 2 F. & F. 726.

(a) *Ferrers v. Robbins* (1835), 2 C. M. & R. 152.

(b) *Papé v. Westacott*, [1894] 1 Q. B. 272; 63 L. J. Q. B. 222, C. A.

(c) *Russell v. Hankey* (1794), 6 T. R. 12; *Wills and Dorset Bank v. Cook* (1889), 5 T. L. R. 703. *Comp. Bank of Scotland v. Dominion Bank*, [1891] A. C. 592, H. L. Sc.

(d) *Commonwealth Portland Cement Co. v. Weber*, [1905] A. C. 66; 74 L. J. P. C. 25, P. C.

(e) See *Dovey v. Corey*, [1901] A. C. 477; 70 L. J. Ch. 753, H. L.; *Lucas v. Fitzgerald* (1903), 20 T. L. R. 16.

(f) *Re Oxford Building Society* (1886), 35 Ch. D. 502; 56 L. J. Ch. 98; *Flitcroft's Case* (1882), 21 Ch. D. 519; 52 L. J. Ch. 217, C. A.; *Re Bennett* (1892), 8 T. L. R. 194, C. A.; *Leeds Estate Co. v. Shepherd* (1887), 36 Ch. D. 787; 57 L. J. Ch. 46. As to the liability of shareholders receiving the dividends, see *Mozham v. Grant*, [1900] 1 Q. B. 88; 69 L. J. Q. B. 97, C. A.; *Towers v. African Tug Co.*, [1904] 1 Ch. 558; 73 L. J. Ch. 395, C. A.; *Lucas v. Fitzgerald* (1903), 20 T. L. R. 16.

(g) See note (e), above; *Préfontaine v. Grenier*, [1907] A. C. 101; 76 L. J. P. C. 4, P. C.

by his breach of duty (*h*). So, where a solicitor without reasonable cause, or without giving his client reasonable notice of his intention to do so, abandons the prosecution or defence of an action, he is liable to the client for any loss occasioned thereby (*i*).

13. A shipmaster signs a bill of lading which is incorrectly dated. He is liable to his principals in an action for negligence (*k*).

14. An auctioneer sells property under conditions requiring the payment of an immediate deposit. He is liable in damages if he negligently permit the highest bidder to go away without paying the deposit (*l*).

15. An auctioneer, having sold property, rescinds the contract of sale without the authority of the vendor. He is liable to the vendor for damages (*m*).

16. An insurance broker was employed to insure certain goods from a particular point in the voyage. He insured them "at and from that point, beginning the adventure from the loading thereof on board." Held, that he had been guilty of negligence, for the consequences of which he was liable to his principal (*n*). Actions for negligence against insurance brokers have also been held to lie—(a) for not effecting a policy within a reasonable time (*o*); (b) for an omission to insert a clause usually inserted when insuring from a particular point (*p*); and (c) for an omission to communicate a material letter to the underwriters, in consequence of which the principal failed in an action on the policy (*q*). But, where a broker acts in good faith and in accordance with usage in effecting a policy, the mere fact that the insurance might possibly have been effected on better terms is not sufficient to render the broker liable to the principal for damages. To render him liable, it must appear that he has been guilty of negligence or of some breach of duty (*r*).

17. The directors of a limited company, whose object was to purchase a certain business, were authorised by the articles of association "to purchase or acquire the said business as it then stood, upon such terms and under such stipulations as might be agreed upon." The business was insolvent. Held, that the directors were not liable, in the absence of gross negligence, for the consequences of so carrying out the object of the company, they being authorised to purchase the business as it stood, which was an act in itself imprudent (*s*). Nor are directors liable for mere mistakes or errors of judgment, provided they act honestly and within their powers, and exercise

(*h*) *Taylor v. Blacklow* (1836), 3 Scott, 614. See also *Barber v. Stone* (1881), 50 L. J. Q. B. 297.

(*i*) *Hoby v. Buitt* (1832), 3 B. & Ad. 350.

(*k*) *Stumore v. Breen* (1886), 12 App. Cas. 698; 56 L. J. Q. B. 401, H. L.

(*l*) *Hibbert v. Bayley* (1860), 2 F. & F. 48; comp. *Andrade v. Sotheby* (1931), 47 T. L. R. 244.

(*m*) *Nelson v. Aldridge* (1818), 2 Stark. 435.

(*n*) *Park v. Hammond* (1816), 6 Taunt. 495. See also *Dickson v. Devitt* (1916), 86 L. J. K. B. 315.

(*o*) *Turpin v. Bilton* (1843), 5 M. & G. 455; 12 L. J. C. P. 167.

(*p*) *Mallough v. Barber* (1815), 4 Camp. 150.

(*q*) *Maydew v. Forrester* (1814), 5 Taunt. 615.

(*r*) *Moore v. Morque* (1776), Cowp. 479; *Comber v. Anderson* (1808), 1 Camp. 523. And see *Nitrate Producers' Co. v. Wills* (1905), 21 T. L. R. 699, H. L.

(*s*) *Overend v. Gibb* (1872), L. R. 5 H. L. 480; 42 L. J. Ch. 67, H. L.

such care and skill as may reasonably be expected, having regard to their knowledge and experience (t); and they are entitled to rely upon information furnished by the officials of the company, unless there are grounds for suspecting such information to be false, with respect to matters with which it is the duty of such officials to be acquainted (u).

18. *Damage must be legal damage.*—A employs B, a turf commission agent, to make bets on his behalf. B undertakes the commission, and neglects to make the bets. A has suffered no legal damage, because the bets would have been void, and A would not have been able to recover them by action, even if B had duly made them on his behalf. A therefore cannot maintain an action against B for breach of duty, though it may be customary to pay such debts without action (x). So, where an agent who was instructed to insure certain slaves neglected to do so, it was held that he was not liable to his principal in an action for negligence, although it was customary for underwriters to pay in respect of such a policy, because, by reason of its illegality, the principal would have been unable to recover upon the policy at law (y). So, where insurance brokers obtained a policy which was in a form which rendered it void as a p.p.i. policy, the form being in accordance with their instructions, but they negligently failed to disclose a certain risk, and the underwriters repudiated liability on the ground of non-disclosure, it was held that the policy holders had suffered no damage (z).

19. *Nominal damages, though no actual loss.*—An agent is instructed to present a bill for acceptance. He neglects to do so. The principal is entitled to recover nominal damages for the breach of duty, though he suffered no actual loss thereby, the bill having been paid by other parties thereto. In such a case legal damage is presumed (a).

20. *Negligence of gratuitous agent.*—A customer deposited certain securities with his bankers for safe keeping, the bankers receiving no reward for taking care of them. The securities were stolen by a clerk in the bankers' employ. Held, that the bankers, having acted gratuitously, were not liable, there being no evidence of gross negligence on their part (b). A gratuitous agent is liable for gross negligence in the course of the agency (c); but not for mere want of skill (d), unless he is in a situation from which skill may be

(t) *Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate*, [1899] 2 Ch. 392; 68 L. J. Ch. 699, C. A.

(u) *Dovey v. Cory*, [1901] A. C. 477; 70 L. J. Ch. 753, H. L.; *Préfontaine v. Grenier*, [1907] A. C. 101; 76 L. J. P. C. 4, P. C.

(x) *Cohen v. Kittell* (1889), 22 Q. B. D. 680; 58 L. J. Q. B. 241.

(y) *Webster v. De Tastet* (1797), 7 T. R. 157. See also *Duncan v. Skipwith* (1809), 2 Camp. 68; *Weld-Blundell v. Stephens*, [1920] A. C. 956; 89 L. J. K. B. 705, H. L.; *Bradstreets British, Ltd. v. Mitchell*, [1933] Ch. 190; 102 L. J. Ch. 34; *Howard v. Odhams Press, Ltd.* (1937), 106 L. J. K. B. 675.

(z) *Cheshire v. Vaughan*, [1920] 2 K. B. 240; 89 L. J. K. B. 1168, C. A.

(a) *Van Wart v. Woolley* (1830), M. & M. 520.

(b) *Giblin v. McMullen* (1869), L. R. 2 P.-C. 317; 38 L. J. P. C. 25, P. C.; *Bullen v. Swan Electric Engraving Co.* (1907), 23 T. L. R. 258, C. A. Comp. Re *United Service Co.*, *Johnston's claim* (1870), L. R. 6 Ch. 212; 40 L. J. Ch. 286.

(c) *Ellsee v. Gatward* (1793), 5 T. R. 143; *Wilkinson v. Coverdale* (1793), 1 Esp. 75; 53 R. R. 256; *Beauchamp v. Powley* (1831), 1 M. & Rob. 38; *Doorman v. Jenkins* (1834), 4 L. J. K. B. 29; 2 A. & E. 250.

(d) *Moffatt v. Bateman* (1869), L. R. 3 B. C. 115, P. C.

implied (e). But an omission to exercise such skill as he actually possesses, or has held himself out to possess, or such skill as may reasonably be implied from his profession or employment, or to exercise such care and diligence as he is in the habit of exercising in regard to his own affairs, is deemed to be gross negligence, for the consequences of which he is responsible to the principal (f).

Liability of Solicitors for Negligence.

A solicitor is not liable to his client for negligence in the performance of his duties as such, unless he has been guilty of gross negligence or gross ignorance (g). Where, however, there is any evidence at all of negligence, the question whether there has been gross negligence or not ought to be submitted to the jury (h). A lessee consulted a solicitor in reference to the building of a certain wall, to the erection of which the lessor objected. The lease was shown to the solicitor, who, without making any inquiry as to whether there was any obstacle other than such as might be ascertained from the lease, advised that the lessee might build the wall, there being, in fact, a restrictive covenant in favour of the original vendors. Held, that there was no evidence of negligence (i). So, a solicitor is not liable merely because he has made a mistake, or has given his client erroneous or bad advice (k); or has misinterpreted a rule of Court, the meaning of which is obscure (l). Nor is he liable for an error of judgment upon a point of new occurrence, or of nice or doubtful construction, or in respect of a matter such as is usually intrusted to counsel (m). But he is liable for the consequences of his ignorance or non-observance of the rules of practice; for want of reasonable care in the preparation of a cause for trial, or for neglecting to attend at the trial with his witnesses; or for the mismanagement of so much of the cause as is usually intrusted to him (m). Thus, where a solicitor was employed to take proceedings against certain apprentices for misconduct, and proceeded on the section of the statute relating to servants, he was held liable for the damages and costs incurred by reason of the error (n). So, where a solicitor allowed a case to be called on without ascertaining whether a material witness, whom his client had promised to bring, was in Court, it was held that there was sufficient evidence of want of reasonable care to go to the jury (o). Where a solicitor allowed judgment to go against

(e) *Shiells v. Blackburne* (1789), 1 H. Bl. 159.

(f) *Wilson v. Brett* (1843), 11 M. & W. 113; 12 L. J. Ex. 264; 63 R. R. 528; *Dartnall v. Howard* (1825), 4 B. & C. 345; *Whitehead v. Greetham* (1825), 2 Bing. 464, Ex. Ch.; *Donaldson v. Haldane* (1840), 7 C. & F. 762, H. L.

(g) *Purves v. Landell* (1845), 12 C. & F. 91, H. L.; *Chapman v. Van Toll, Van Toll v. Chapman* (1857), 27 L. J. Q. B. 1; 8 E. & B. 396; *Dooby v. Watson* (1888), 39 Ch. D. 178; 57 L. J. Ch. 865; *Lourey v. Guilford* (1832), 5 C. & P. 234; 38 R. R. 818; *Pitt v. Yalden*, 4 Burr. 2060.

(h) *Ireson v. Pearman* (1825), 3 L. J. (o.s.) K. B. 119; 3 B. & C. 799.

(i) *Pitman v. Francis* (1884), 1 C. & E. 355.

(k) *Purves v. Landell* (1845), 12 C. & F. 91, H. L.; *Barker v. Fleetwood* (1890), 6 T. L. R. 430, C. A.; *Faithfull v. Kesteven* (1910), 103 L. T. 56, C. A.

(l) *Laidler v. Elliott* (1825), 3 B. & C. 738; *Bulmer v. Gilman* (1842), 4 M. & G. 108.

(m) *Godefroy v. Dalton* (1830), 6 Bing. 460; *Kemp v. Burt* (1833), 2 L. J. K. B. 69; 4 B. & Ad. 424; *Hawkins v. Harwood* (1849), 4 Ex. 503; *De Rouffigny v. Pralle* (1811), 3 Taunt. 484.

(n) *Hart v. Frame* (1839), 6 Cl. & F. 193, H. L.

(o) *Reece v. Rigby* (1821), 4 B. & A. 202.

his client by default, it was held that the solicitor must show that there was no defence, in order to rebut the inference of negligence, and that it was not necessary for the client to prove that he had a good defence (*p*). Solicitors have been held liable in actions for negligence for lending money on insufficient security (*q*); for omitting to give due notice of an assignment of a chose in action (*r*); for omitting to make proper inquiries and searches in an investigation of title (*s*); for suing where the Court had no jurisdiction (*t*); for not duly filing certain writs, in accordance with the practice of the Court (*u*); for not using due diligence to obtain satisfaction of a judgment (*x*); for investing trust moneys in improper securities (*y*); for omitting to procure the investment of the proceeds of property sold by order of the Court (*z*); for not explaining the effect of an unusual covenant in a deed executed by a client (*a*); for missing a case which had been transferred to another Judge without the solicitor's knowledge, by order of the Lord Chancellor (*b*); and for neglecting to start proceedings within the time limited by the Public Authorities Protection Act, 1893 (*c*). If property come to a solicitor in consequence of his ignorance, or of a breach of duty on his part, he is a trustee thereof for the persons who would have been entitled if he had known and done his duty. No solicitor is permitted to take advantage of his own ignorance or breach of duty (*d*).

Article 59.

MEASURE OF DAMAGES FOR NEGLIGENCE OR OTHER BREACH OF DUTY.

The measure of damages in an action by a principal against his agent for negligence or any other breach of duty by the agent in the course of the agency is such loss, suffered by the principal, as is the direct and proximate result of such negligence or breach of duty (*e*).

- (*p*) *Godefroy v. Jay* (1831), 7 Bing. 413.
- (*q*) *Re Partington, Partington v. Allen* (1887), 57 L. T. 654; *Pretty v. Fowke* (1887), 3 T. L. R. 845; *Craig v. Watson* (1845), 8 Beav. 427. See also *Nocton v. Ashburton*, [1914] A. C. 932; 83 L. J. Ch. 784, H. L.
- (*r*) *Bean v. Wade* (1885), 2 T. L. R. 157, C. A.; *Donaldson v. Haldane* (1840), 7 C. & F. 762, H. L.
- (*s*) *Cooper v. Stephenson* (1852), 21 L. J. Q. B. 292; *Allen v. Clark* (1863), 7 L. T. 781.
- (*t*) *Williams v. Gibbs* (1836), 5 Ad. & E. 208.
- (*u*) *Hunter v. Caldwell* (1847), 10 Q. B. 69, 83; 16 L. J. Q. B. 274; 74 R. R. 203, Ex. Ch.
- (*x*) *Russell v. Palmer* (1767), 2 Wils. 325.
- (*y*) *Blyth v. Fladgate, Morgan v. Blyth, Smith v. Blyth*, [1891] 1 Ch. 337; 60 L. J. Ch. 66.
- (*z*) *Batten v. Wedgwood Coal Co.* (1886), 2 T. L. R. 236.
- (*a*) *Stannard v. Ullithorn* (1834), 3 L. J. C. P. 307; 10 Bing. 491.
- (*b*) *Burgoin v. Taylor* (1878), 9 Ch. D. 1; 47 L. J. Ch. 542, C. A.
- (*c*) 56 & 57 Vict. c. 61; *Fletcher v. Jubb*, [1920] 1 K. B. 275; 89 L. J. K. B. 236, C. A.; see now Limitation Act, 1939 (2 & 3 Geo. 6, c. 21) s. 21.
- (*d*) *Bulkley v. Wilford* (1834), 2 Cl. & F. 102, H. L.
- (*e*) Article 47, Illustration 10; *Salvesen v. Rederi Aktiebolaget Nordstjernan*, [1905] A. C. 302; 74 L. J. P. C. 90; *Re Polemis and Furness, Withy & Co., Ltd.*, [1921] 3 K. B. 560; 90 L. J. K. B. 1353, C. A. (measure of damages in negligence generally); *The Edison*, [1933] A. C. 449; 102 L. J. P. 73, H. L.; *Becker v. Medd* (1897), 13 T. L. R. 313, C. A.; comp. *Hadley v. Baxendale* (1854), 9 Ex. 341; 23 L. J. Ex. 182, C. A. And see Illustrations, and Article 58, Illustrations 8 and 18.

Illustrations.

1. A commission agent in Hong Kong was instructed to purchase a quantity of a certain kind of opium. He purchased and shipped to his principal opium of an inferior kind. Held, that the proper measure of damages was the loss actually sustained by the principal in consequence of the opium not being of the description ordered, and not the difference between the value of the description ordered and of that shipped (*f*).

2. An agent, employed to find freight, reported to his principals that he had concluded a bargain for a charter, when in fact no bargain had been concluded. Held, that the principals were entitled to the actual damage suffered in consequence of having acted upon the misrepresentation, but not to the profit which they would have earned if the representation had been true (*g*).

3. An agent is instructed to insure his principal's goods, and wilfully or negligently omits to do so. He is liable to the same extent as the underwriters would have been if the goods had been duly insured (*h*).

4. An insurance broker, in effecting a policy, omitted to disclose a material letter, in consequence of which his principal failed in an action against some of the underwriters on the policy, and was compelled to make restitution to others who had paid their shares of the loss without action. Held, that the broker was liable for the actual loss sustained by the principal in consequence of the omission, including the amounts so repaid to the underwriters (*i*).

5. A employs B to buy tobacco of the best quality. B delegates his employment to C, who buys an inferior quality. A recovers damages from B for the breach of duty. B is entitled to recover from C the full amount of the damages and costs incurred by him in the action by A (*k*).

6. A solicitor, who was employed to effect a mortgage on a piece of land, neglected to ascertain that a third person had an equitable charge thereon to the extent of £46. The mortgagee was compelled to pay the amount of the charge, on a sale of the property, to enable him to convey it to the purchaser. Held, that £46 was the proper measure of damages for the negligence, in the absence of evidence reducing the amount (*l*).

7. A stockbroker, employed to sell joint stock bank shares, omitted to insert in the contract the number of the shares, or the name of the registered proprietor thereof as required by Leeman's Act (*m*), the omission rendering the contract void. Held, that the principal was entitled to recover, as damages for the breach of duty, the amount he would have obtained for the shares if they had been validly sold (*n*).

(*f*) *Casseaboglou v. Gibb* (1882), 11 Q. B. D. 797; 52 L. J. Q. B. 538, C. A.

(*g*) *Salvesen v. Rederi Aktiebolaget Nordstjernam*, [1905] A. C. 302; 74 L. J. P. C. 96; and see *Johnston v. Braham*, [1917] 1 K. B. 586; 86 L. J. K. B. 613, C. A.

(*h*) *Smith v. Price* (1862), 2 F. & F. 748; *Tickel v. Short* (1750), 2 Ves. 238.

(*i*) *Maydew v. Forrester* (1814), 5 Taunt. 615. Comp. *Re United Service Co., Johnston's claim* (1870), L. R. 6 Ch. 212; 40 L. J. Ch. 286.

(*k*) *Mainwaring v. Brandon* (1818), 2 Moore, 125.

(*l*) *Whiteman v. Hawkins* (1878), 4 C. P. D. 13.

(*m*) *Banking Companies (Shares) Act*, 1867 (30 & 31 Vict. c. 29), s. 1.

(*n*) *Neilson v. James* (1882), 9 Q. B. D. 546; 51 L. J. Q. B. 369, C. A.

8. An agent was instructed not to part with the possession or control of certain goods until they were paid for. He parted with them, and the purchaser failed to pay the price. Held, that the measure of damages was the value of the goods, which the principal had lost in consequence of the breach of duty (o).

9. An agent, acting under a power of attorney, wrongfully transferred to himself certain shares belonging to his principal, in satisfaction of a claim which the principal partly admitted and partly disputed. Held that the principal was entitled to recover the full value of the shares (p).

10. Directors of a company wrongfully allotted shares to themselves at an undervalue. It was held that they must account to the company for profits obtained in respect of the shares they had disposed of; and as to those which they retained, that they were liable to pay by way of damages in respect of the wrongful allotment the difference between the price at which the shares were allotted and their highest market value taken as a whole during the time they held them, which in the circumstances was the market value at the time of the allotment; but that the damage must not be measured by their value if sold in small lots at different times (q).

11. An agent, being instructed to buy certain stock, sells stock of his own to the principal, fraudulently representing that it belongs to third persons. The principal holds the stock for some months after discovering the circumstances, and then resells. The measure of damages for the breach of duty is the difference between the price paid by the principal and the price at which he could have resold at the time when he discovered the fraud, and not the loss ultimately sustained by him (r).

12. A stockbroker, having agreed to carry over certain shares to the next settlement, and having made the necessary arrangements with a jobber for that purpose, wrongfully closed the account by selling the shares without the principal's instructions, and the principal gave him notice that he would insist upon performance on settling day. When the shares were sold prices were falling, but they rose again and were higher on settling day than at the time of the sale, having been still higher in the meantime. It was held that the principal was entitled to insist upon performance on settling day, and to measure the damages with reference to the prices on that day (s). Whether he could have claimed to assess the damages on the basis of the highest prices between the time of the sale and settling day, *quære* (s).

13. A banker wrongfully dishonours the cheque of a trading customer. The jury are entitled to award substantial damages without proof of special or actual damage (t).

14. A pays £400 to his bankers for the specific purpose of providing for a certain bill, he being then indebted to them in a larger amount. The

(o) *Stearine Co. v. Heintzmann* (1864), 17 C. B. (N.S.) 56.

(p) *Dantra v. Stiebel* (1863), 3 F. & F. 951.

(q) *Shaw v. Holland*, [1900] 2 Ch. 305; 69 L. J. Ch. 621, C. A.

(r) *Waddell v. Blockey* (1879), 4 Q. B. D. 678; 48 L. J. Q. B. 517.

(s) *Michael v. Hart*, [1902] 1 K. B. 482; 71 L. J. K. B. 285, C. A.

(t) *Rolin v. Steward* (1854), 23 L. J. P. C. 148; 14 C. B. 596; *Wilson v. United Counties Bank*, [1920] A. C. 102; 88 L. J. K. B. 1033, H. L.

bankers place the amount to his credit, and dishonour the bill. A becomes bankrupt. The trustee in bankruptcy is entitled to recover from the bankers, as damages for the breach of duty, the full amount of the bill (u).

15. An agent wrongfully abandoned his agency. Held, that he was liable, in the circumstances, for loss of business in consequence of injury done to the principal's credit, and loss in consequence of the suspension of the business (x).

16. Estate agents, employed to find a purchaser, procured an offer from A which their principal accepted, subject to contract. B then made an offer to the agents to purchase the property from A at an increased price. The agents did not inform the principal of B's offer; and the principal, in ignorance of that offer, concluded a contract of sale with A. Held, that the measure of damages, for the agents' breach of duty in failing to inform their principal of B's offer, was the difference between the price agreed with A and that offered by B (y).

Article 60.

LIABILITY OF AGENTS ACCEPTING BRIBES.

Where an agent accepts any money or property in the course of his agency by way of a bribe, he is liable to account for the money, or for the highest value of the property while in his possession, and to pay over the amount as money received to the use of the principal (z), with interest at the rate of five per cent. per annum from the date of the receipt of the bribe; and where he has been induced by the bribe to depart from his duty to the principal, he is also liable, jointly and severally with the person who bribed him, to make good any loss suffered by the principal in consequence of such departure from duty, without taking into consideration the amount of the bribe so accounted for or paid over to the principal (a), and to forfeit any commission or remuneration which would otherwise have been payable to him (b).

The claim of a principal in respect of a bribe received by his agent is barred by the Statute of Limitations, in equity as well as at law, after the expiration of six years from the time when the principal became aware of the bribery (c).

(u) *Hill v. Smith* (1844), 13 L. J. Ex. 243; 12 M. & W. 618.

(x) *Boyd v. Fitt* (1864), 11 L. T. 280.

(y) *Keppel v. Wheeler*, [1927] 1 K. B. 577; 96 L. J. K. B. 433, C. A.

(z) It is immaterial that the agent has not been influenced by the bribe to depart from his duty: see *Harrington v. Victoria Graving Dock Co.* (1878), 3 Q. B. D. 549; 47 L. J. Q. B. 594.

(a) Illustration 1; *Morgan v. Elford* (1876), 4 Ch. D. 352; *Phosphate Sewage Co. v. Hartmont* (1877), 5 Ch. D. 394, 448, C. A.; *Cohen v. Kushke* (1900), 83 L. T. 102; *E. I. Co. v. Henchman* (1791), 1 Ves. jun. 289. And see the Public Bodies Corrupt Practices Act, 1889 (52 & 53 Vict. c. 69), s. 2 (b), for power of the Court to order the recipient of a bribe, who has been convicted under that Act, to pay the amount or value of the bribe to the public body concerned. As to the rights of the principal against third persons in cases of bribery, see Article 114.

(b) See Article 71.

(c) *Metropolitan Bank v. Heiron* (1880), 5 Ex. D. 319, C. A.

The principal is justified in dismissing without notice any agent who accepts a bribe in the course of his agency (*d*).

Illustrations.

1. An agent, in consideration of a bribe, induces his principal to contract with the person bribing him. The principal is entitled to recover from the agent the amount of the bribe, as money received to his use, and from the agent and the person bribing him, jointly and severally, any loss incurred through having been so induced to contract (*e*).

2. An information will lie against a servant of the Crown for secret profits made in the course of his employment, although no pecuniary interest of the Crown is involved (*f*).

3. A director of a company, who was a shareholder in two other companies, accepted bonuses from such other companies, in consideration of his giving them orders for goods on behalf of the first company. The articles of association provided that the directors might contract with the company. Held, that the bonuses were bribes; that the director must account to the company for them, with interest; and that the bribery justified the dismissal of the director, although it was not discovered until after the dismissal (*g*).

4. The secretary of a company, when making a contract on behalf of the company with the vendor, stipulated that he should receive, and subsequently did receive, from the vendor, 600 fully paid-up shares. Held, that he must account to the company for the highest value borne by the shares during the time they were held by him, which in this case was assumed to be the nominal value (*h*).

5. A director of a company, before the transactions between the promoter and the company have been finally completed, accepts his qualification shares from the promoter. The director must account to the company for the highest value attributable to the shares during the time they are held by him, with interest on such value from the date the shares were transferred to him to the date of the action (*i*). So, if a director receive the money to pay for his qualification shares, he must account for the amount received, with interest from the date of its receipt (*k*). Where a promoter sold shares to a director, the director was compelled to account for the difference between the nominal value of the shares and the price he paid for them (*l*).

(*d*) Illustration 3; and see *Bulfield v. Fournier* (1896), 11 T. L. R. 282, C. A.; *Swale Ipswich Tannery* (1906), 11 Com. Cas. 88.

(*e*) *Salford Corporation v. Lever*, [1891] 1 Q. B. 168; 60 L. J. Q. B. 39, C. A.; *Hovenden v. Millhoff* (1900), 83 L. T. 41, C. A.

(*f*) *Att.-Gen. v. Goddard* (1929), 98 L. J. K. B. 743.

(*g*) *Boston Deep Sea Fishing and Ice Co. v. Ansell* (1888), 39 Ch. D. 339, C. A.; *Temperley v. Blackrod Manufacturing Co., Ltd.* (1907), 71 J. P. 341.

(*h*) *McKay's Case* (1875), 2 Ch. D. 1; 45 L. J. Ch. 148, C. A.

(*i*) *Nant-y-glo Iron Co. v. Grave* (1878), 12 Ch. D. 738; *Pearson's Case* (1877), 5 Ch. D. 336; 46 L. J. Ch. 339, C. A.; *Eden v. Ridsdale's Lump Co.* (1889), 58 L. J. Q. B. 597, C. A.; *Mitcalfe's Case* (1879), 13 Ch. D. 169; 49 L. J. Ch. 301, C. A.

(*k*) *Hay's Case* (1875), L. R. 10 Ch. 593; 44 L. J. Ch. 721; *McLean's Case* (1885), 55 L. J. Ch. 36.

(*l*) *Weston's Case* (1879), 10 Ch. D. 579; 48 L. J. Ch. 425, C. A.

6. An agent, who was employed to purchase goods, accepted large sums from the vendor by way of bribery, and invested part of the amount. The principal claimed to follow the money, and prayed for an injunction to restrain the agent from dealing with the investment, and an order directing him to bring the amount into Court. Held, that the relation between the parties was that of debtor and creditor, not that of trustee and *cestui que trust*, and that the plaintiff was not entitled to follow the money (*m*).

Criminal Liability.

An agent who accepts, or agrees to accept, a bribe, is, at common law, guilty of the misdemeanour of conspiracy (*n*).

By the Prevention of Corruption Act, 1906 (*o*), s. 1, if any agent (*p*) corruptly (*q*) accepts, or obtains, or agrees to accept, or attempts to obtain, for himself or for any other person, any gift or consideration (*r*) as an inducement or reward for doing, or forbearing to do, or for having done, or forborne to do any act in relation to his principal's (*s*) affairs (*t*) or business, or for showing or forbearing to show favour or disfavour to any person, in relation thereto, he is guilty of a misdemeanour (*u*). Any person who corruptly gives, or agrees to give, or offers any such gift or consideration is similarly guilty (*x*).

(*m*) *Lister v. Stubbs* (1890), 45 Ch. D. 1; 59 L. J. Ch. 570, C. A.; *Powell v. Jones*, [1905] 1 K. B. 11; 74 L. J. K. B. 115, C. A.

(*n*) *R. v. Whitaker*, [1914] 3 K. B. 1283, C. C. A.; *R. v. Barber* (1887), 3 T. L. R. 491. See also *R. v. De Kromme* (1892), 66 L. T. 301 (person offering bribe guilty of inciting to conspire).

(*o*) 6 Edw. 7, c. 34. See also the Public Bodies Corrupt Practices Act, 1889 (52 & 53 Vict. c. 69).

(*p*) Includes any person employed by or acting for another: s. 1 (2); and also any person serving under the Crown or under any corporation or any municipal borough, county or district council: s. 1 (3), or under any local or public authority: Prevention of Corruption Act, 1916 (6 & 7 Geo. 5, c. 64), s. 4.

(*q*) Where the consideration has been received by an employee of His Majesty or of a Government Department or public body (including any local or public authority) from a person, or the agent of a person, holding, or seeking, a contract from His Majesty or from a Government Department or public body, corruption is presumed until the contrary is proved: Prevention of Corruption Act, 1916 (6 & 7 Geo. 5, c. 64), ss. 2, 4; *R. v. Jenkins* (1923), 87 J. P. 115. It is sufficient to establish the contrary by reasonable probability: *R. v. Carr-Briant*, [1943] K. B. 607; 112 L. J. K. B. 581.

(*r*) Includes valuable consideration of any kind: 1906 Act, s. 1 (2).

(*s*) Includes an employer: *ibid*.

(*t*) Pecuniary interest need not be involved: *Att.-Gen. v. Goddard* (1929), 98 L. J. K. B. 743.

(*u*) The punishment upon conviction on indictment is imprisonment not exceeding two years or a fine not exceeding £500, or both: upon summary conviction, imprisonment not exceeding four months, or fine not exceeding £50, or both (1906 Act, s. 1 (1)); but in the case of a contract, or proposal for a contract, with His Majesty, or with a Government Department or public body, the maximum sentence, upon conviction on indictment, is penal servitude for seven years and £500 fine (1916 Act, s. 1). Consent of the Attorney-General or Solicitor-General is required before prosecution (1906 Act, s. 2 (1)). Quarter sessions have no jurisdiction in cases of prosecution on indictment (s. 2 (5)); but a person aggrieved by summary conviction may appeal to quarter sessions (s. 2 (6)). Summary proceedings may be taken within six months after discovery of the offence (1916 Act, s. 3).

(*x*) 1906 Act, s. 1 (1). The sub-section also provides against the use of documents containing false statements, with intent to deceive the principal.

Article 61.

WHEN LIABLE TO PAY INTEREST.

An agent is not generally liable to pay interest upon money received by him to the use of his principal, except where he receives or deals with the money improperly, and in breach of his duty (*y*), or refuses to pay it over to the principal on demand (*z*). An agent who receives or deals with the money of his principal improperly, and in breach of his duty, or who refuses to pay it over on demand, is liable to pay interest from the time when he so receives or deals with the same, or from the time of the demand, as the case may be (*y*).

Illustrations.

1. An agent, at the request of his principal, retained large sums of money in his hands, and duly accounted for the same. Held, that he was not liable to pay interest, though he had made use of the money for his own purposes (*a*). But, as a general rule, where an agent applies the principal's money to his own use, he is bound to pay interest thereon, it being his duty to act in the agency solely for the principal's benefit (*b*).

2. A solicitor was authorised by power of attorney to sell certain property and invest the proceeds. He paid the proceeds into the account of his firm, who made use of the money. Held, that he must pay interest at the rate of five per cent. (*c*).

3. An agent, who undertook to invest his principal's money in the funds, kept large balances in his hands. Held, that he must pay interest on such balances (*d*).

4. An agent had the entire management of his principal's affairs for many years without being called upon for an account. Errors were then discovered, and upon a bill being filed for an account, a large sum was found to be due. Held, that, in the absence of fraud, the agent was not liable to pay interest upon the balances in his hands (*e*).

5. The solicitor of the vendor at a sale by auction received a deposit as the agent of the vendor. Held, that he was liable to pay interest thereon

(*y*) *Wolfe v. Findlay* (1847), 16 L. J. Ch. 241; 6 Hare, 66; *Fry v. Fry* (1864), 10 Jur. (N.S.) 983. Illustrations 1 to 6.

(*z*) *Barclay v. Harris* (1915), 85 L. J. K. B. 115; *Harsant v. Blaine* (1887), 56 L. J. Q. B. 511, C. A.; *Pearse v. Green* (1819), 1 Jac. & W. 135. Illustration 5. See, however, the Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41), s. 3, by which Courts of Record are empowered to give interest upon the amount of debt or damages for which judgment is given, or upon part of that amount, at such rate as the Court thinks fit, for the whole or part of the period between the date when the cause of action arose and the date of judgment.

(*a*) *Chedworth v. Edwards* (1802), 8 Ves. 48.

(*b*) *Rogers v. Boehm* (1799), 2 Esp. 704.

(*c*) *Burdick v. Garrick* (1869), L. R. 5 Ch. 233; 39 L. J. Ch. 369.

(*d*) *Brown v. Southouse* (1790), 2 Bro. C. C. 107; *Barwell v. Parker* (1751), 2 Ves. 364.

(*e*) *Turner v. Burkinshaw* (1867), L. R. 2 Ch. 488, such a case would now be within the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, s. 3: see note (*z*), above.

from the date of a demand made by the vendor (*f*). But a stakeholder is not liable to pay interest, even where he uses, and himself obtains interest on, the money. Thus, where an auctioneer received a deposit, and invested and obtained interest upon the amount, it was held that he was not liable to pay over the interest on the completion of the sale. In this respect, there is an essential difference between an agent and a stakeholder (*g*).

6. An agent is bound to pay interest upon bribes (*h*), and profits made in the course of his agency without the principal's knowledge (*i*), and in all cases of fraud or wilful concealment (*k*).

Article 62.

LIABILITY TO ATTACHMENT.

Where an agent is ordered to pay over money received by him in a fiduciary capacity, he may at the discretion of the Court be attached, on default in such payment, though he may have parted with the money, or become a bankrupt or insolvent (*l*).

Article 63.

LIABILITY FOR ACTS OF SUB-AGENTS AND CO-AGENTS.

Every agent who employs a sub-agent is liable to the principal for money received by the sub-agent to the principal's use (*m*). and is responsible to the principal for the negligence and other breaches of duty of the sub-agent in the course of his employment (*n*): but co-agents, not being partners, are not, as such, responsible to the principal for the acts or defaults of each other (*o*).

(*f*) *Edgell v. Day* (1865), L. R. 1 C. P. 80; 35 L. J. C. P. 7.

(*g*) *Harington v. Hoggart* (1830), 9 L. J. (o.s.) K. B. 14; 1 B. & Ad. 577; 35 R. R. 382.

(*h*) Article 60, Illustrations 3 and 5.

(*i*) *Benson v. Heathorn* (1842), 1 Y. & Coll. C. C. 326; *Tyrell v. Bank of London* (1862), 10 H. L. Cas. 26; 31 L. J. Ch. 369.

(*k*) *Hardwicke v. Vernon* (1808), 14 Ves. 504.
(*l*) *Debtors Act*, 1869, s. 4 (3); *Marris v. Ingram* (1879), 13 Ch. D. 338; 49 L. J. Ch. 123; *Crowther v. Elgood* (1887), 34 Ch. D. 691; 56 L. J. Ch. 416, C. A. (auctioneer attached for not paying over the price of goods sold by him); *Lutchfield v. Jones* (1887), 36 Ch. D. 530; 57 L. J. Ch. 100 (town agent, in an action for an account of his agency by country solicitor); *Lewes v. Barnett* (1878), 6 Ch. D. 252; 47 L. J. Ch. 144, C. A.; *Preston v. Etherington* (1887), 4 T. L. R. 47, C. A.; *Re Smith, Hands v. Andrews* (1893), 9 T. L. R. 238, C. A. See also *Re Edye* (1891), 63 L. T. 762; *Re Dudley, ex p. Monet* (1883), 12 Q. B. D. 44; 53 L. J. Q. B. 16, C. A.; *Re Grey* (1892), 8 T. L. R. 694, C. A.; *Re Wray* (1887), 36 Ch. D. 138; 56 L. J. Ch. 1106; *Re Barfield* (1871), 24 L. T. 248; *Tilney v. Stansfield* (1880), 28 W. R. 582, as to the attachment of solicitors for default in payment of money due from them as officers of the Court. As to criminal liability of an agent who fraudulently misappropriates or deals with money or goods intrusted to him as such, see *Larceny Act*, 1916 (6 & 7 Geo. 5, c. 50), ss. 20, 22.

(*m*) *Mathews v. Haydon* (1796), 2 Esp. 509; *Re Mitchell* (1884), 54 L. J. Ch. 342; *National Employers', etc., Insurance Assn. v. Elphinstone*, [1929] W. N. 135.

(*n*) *Meyerstein v. Eastern Agency Co.* (1885), 1 T. L. R. 595; *Lord North's Case*, Dy. 161A; *Eccossaise S.S. Co. v. Lloyd* (1890), 7 T. L. R. 76. Illustrations 1 to 4.

(*o*) *Cullerne v. L. & S. Building Society* (1890), 25 Q. B. D. 485; 59 L. J. Q. B. 525, C. A.; *Perry's Case* (1876), 34 L. T. 716; *Land Credit Co. v. Fermoy* (1870), L. R. 5 Ch. 763; *Lucas v. Fitzgerald* (1903), 20 T. L. R. 16. As to the liability of partners, see Article 8. As to the power of trustees and personal representatives to employ agents, without being responsible for their defaults, see *Trustee Act*, 1925 (15 Geo. 5, c. 19), s. 23.

Illustrations.

1. A solicitor is liable to his client for the negligence of his town agent (p).
2. A banker was employed to obtain payment of a bill of exchange. His agent obtained payment, and became bankrupt before handing the money over. Held, that the banker was liable to his customer for the amount (q). The general rule of law, that an agent is responsible for the acts of a sub-agent employed by him, is not confined to cases where the principal supposes that the agent will act in person (q), but applies even where the sub-agent is appointed with the principal's knowledge (r).
3. A employs B, as an agent, to make advances upon goods. B employs C to make the advances, and authorises him to draw upon A for the amounts. C fraudulently draws upon A for an amount which he has not advanced. B is liable to A for the fraudulent act of C in the course of his employment (s).
4. Moneys are handed, with the approbation of the secretary of a company, to the secretary's private clerk, who is not an officer of the company. The clerk misappropriates the money. The secretary is liable to the company for the amount so misappropriated (t).

(p) *Collins v. Griffin* (1734), Barnes, 37; *Asquith v. Asquith* (1885), W. N. 31.

(q) *Mackersy v. Ramsays* (1843), 9 C. & F. 818, H. L.

(r) *Skinner v. Weguelin* (1882), 1 C. & E. 12.

(s) *Swire v. Francis* (1877), 3 App. Cas. 106; 47 L. J. P. C. 18.

(t) *Re Mutual Aid Building Society, ex p. James* (1883), 49 L. T. 530.

CHAPTER X.

RIGHTS OF AGENTS AGAINST THEIR PRINCIPALS.

Sect. 1.—*Remuneration.*

Article 64.

FOUNDED ON EXPRESS OR IMPLIED CONTRACT.

THE right of an agent to be remunerated for his services is founded upon an express or implied contract between the principal and agent (*a*). A contract for the payment of remuneration may be implied from custom or usage, from the conduct of the principal, or from the circumstances of the particular case (*b*).

Where the remuneration of an agent is provided for by an express contract, no other contract which is inconsistent with the terms thereof, whether founded on custom or otherwise, can be implied (*c*); but evidence of a particular custom or usage may be given for the purpose of explaining any ambiguity in the terms of the express contract, or for the purpose of incorporating a provision which is not inconsistent with the terms thereof (*d*).

Where the remuneration of an agent is not provided for by an express contract, but the circumstances of his employment are such that a contract for the payment of remuneration may be implied (*e*), the amount of the remuneration, and the conditions under which it becomes payable, may be ascertained from the custom or usage of the particular business (*f*). Where there is no such custom or usage, the implied contract is to pay reasonable remuneration.

No barrister has any legal right to recover any fee or remuneration for services rendered by him, as such, nor is any

(*a*) Illustrations 2 and 7.

(*b*) Illustrations 1 and 3.

(*c*) Illustrations 4 and 5. And see Article 65, Illustration 11; Article 66, Illustration 8; *Moore v. Maxwell* (1848), 2 C. & K. 554; *Marshall v. Parsons* (1841), 9 C. & P. 656; *Ward v. Stuart* (1856), 1 C. B. (n.s.) 88; *Fullwood v. Akerman* (1862), 11 C. B. (n.s.) 737; *Biggs v. Gordon* (1860), 8 C. B. (n.s.) 638; *Battams v. Tompkins* (1892), 8 T. L. R. 707, C. A.; *Caine v. Horsefall* (1847), 1 Ex. 519; 17 L. J. Ex. 25; *Allan v. Sundius* (1862), 31 L. J. Ex. 307; 1 H. & C. 123; *Parker v. Ibbetson* (1858), 27 L. J. C. P. 236; 4 C. B. (n.s.) 346; *Phillips v. Briard* (1856), 25 L. J. Ex. 233; *Howard v. Manx Isles SS. Co.*, [1923] 1 K. B. 110; 92 L. J. K. B. 233.

(*d*) See note (*c*), above.

(*e*) Illustrations 1 to 3.

(*f*) Illustration 6. *Cohen v. Paget* (1814), 4 Camp. 96; *Burnett v. Bouch* (1840), 9 C. & P. 620; *Broad v. Thomas* (1830), 7 Bing. 99; *Rucher v. Lunt* (1863), 3 F. & F. 959; *Baring v. Stanton* (1876), 3 Ch. D. 502; *Hall v. Benson* (1836), 7 C. & P. 711; *Kirk v. Evans* (1890), 8 T. L. R. 9; *Turner v. Reeve* (1901), 17 T. L. R. 592; *Stubbs v. Slater*, [1910] 1 Ch. 632; 79 L. J. Ch. 420, C. A.

promise to pay him for any such services binding, either at law or in equity (g).

Illustrations.

1. A entered into an agreement in the following terms—"I hereby agree to enter your service as weekly manager, and the amount of payment I am to receive I leave entirely to you"—and served in that capacity for six weeks. Held, that there was an implied contract to make some payment, at all events, and that A was entitled, in an action on a *quantum meruit*, to recover such an amount as the employer, acting in good faith, ought to have awarded (h).

2. A committee resolved that any services rendered by A should be taken into consideration, and such remuneration be paid to him as should be deemed right. Held, that no action would lie at the suit of A to recover such remuneration, the resolution importing that the committee were to judge whether any, and, if so, what remuneration was due for his services (i). Service, however long continued, creates no right to remuneration unless there is a contract to pay it; and such a contract will only be implied where the circumstances are such as to indicate an understanding between the parties that there should be remuneration (k).

3. A employs an auctioneer to sell property on his behalf. A contract by A to pay the auctioneer the usual commission is implied (l). The mere employment of a professional man, as such, raises a presumption of an intention to remunerate him, and an agreement to do so is implied from such an employment, in the absence of other circumstances rebutting the presumption (m).

4. It was agreed that an agent should receive commission on "all sales effected or orders executed by him." By a usage of trade, no commission was payable in respect of bad debts. Held, that the agent was, nevertheless, entitled to commission on all sales effected by him, including those resulting in bad debts, the usage being inconsistent with the terms of the contract (n).

5. An agent is employed to find a purchaser for certain property at a fixed commission, to be payable only in the event of success. He is not entitled to a *quantum meruit* in the absence of success, such a claim being excluded by the express contract (o). So, where it was agreed that a sailor should

(g) *Kennedy v. Brown* (1864), 32 L. J. C. P. 137; 13 C. B. (N.S.) 677, Ch. App.; *Re May* (1858), 4 Jur. (N.S.) 1169; *Wells v. Wells*, [1914] P. 157; 83 L. J. P. 81; *Re Sandford*, [1935] Ch. 681; 104 L. J. Ch. 335.

(h) *Bryant v. Flight* (1839), 5 M. & W. 114. See also *Jewry v. Busk* (1814), 5 Taunt. 302; *Bird v. M'Gahey* (1849), 2 C. & K. 707.

(i) *Taylor v. Brewer* (1813), 1 M. & S. 290. See also *Roberts v. Smith* (1859), 28 L. J. Ex. 164; 4 H. & N. 315.

(k) *Reeve v. Reeve* (1858), 1 F. & F. 280; *Foord v. Morley* (1859), 1 F. & F. 496. See also *Hulse v. Hulse* (1856), 25 L. J. P. C. 177; 17 C. B. 711; *Loftus v. Roberts* (1902), 18 T. L. R. 532, C. A.

(l) *Miller v. Beale* (1879), 27 W. R. 403; *Turner v. Reeve* (1901), 17 T. L. R. 592.

(m) *Manson v. Baillie* (1855), 2 Macq. H. L. Cas. 80, H. L. But, as to barristers, see note (g), *supra*.

(n) *Bower v. Jones* (1831), 8 Bing. 65.

(o) *Green v. Mules* (1861), 30 L. J. C. P. 343; *M'Leod v. Artola* (1889), 6 T. L. R. 68; *Salter's claim* (1891), 7 T. L. R. 602; *Lott v. Outhwaite* (1893), 10 T. L. R. 76, C. A. Article 65, Illustration 11. If the express contract for remuneration were a nullity,

be paid a fixed sum, provided he continued to serve, and did his duty, during the whole voyage, it was held that no wages could be claimed, either on a *quantum meruit* or otherwise, in the event of his dying before the completion of the voyage (p). On the other hand, where an engineer contracted to perform certain works, calculated to take fifteen months, for a sum of £500, payable by quarterly instalments, and died during the work, it was held that his representatives were entitled to recover two instalments which had accrued due, and were unpaid, at the time of his death (q).

6. A London shipbroker negotiated for the hire of a vessel, and a memorandum of charter was duly signed, but the contract afterwards went off. By a custom of the City of London, shipbrokers who negotiate the hire of vessels are entitled to a certain commission on the amount of the freight, where the contracts are completed, the rate of payment being higher than would fairly compensate them for their services; but are not entitled to any remuneration with respect to contracts which are not completed. Held, that the broker was not entitled to recover either commission or upon a *quantum meruit* for the services rendered, even if the contract went off owing to the act of the principal. The implied contract to pay an agent reasonable remuneration for his services does not arise when there is an express agreement, or one to be inferred from custom, which is inconsistent therewith (r).

7. An agent was employed by a principal for the sale of an hotel. The hotel belonged to a limited company and was subject to a mortgage of £15,000. The issued share capital was £10,000 and all the shares except one were held by the principal who was not personally liable on the mortgage. The sale was carried out by means of a sale of the shares. Held, that the agent was entitled to commission on £10,000 and not on £25,000 (s).

Article 65.

COMMISSION ONLY ON TRANSACTIONS DIRECTLY RESULTING FROM THE AGENCY.

Where the remuneration of an agent is a commission upon transactions brought about by him, or is only payable in the event of a transaction being brought about by him, he is not entitled to be paid such remuneration unless the transaction in respect of which it is claimed is a direct, though not necessarily an immediate, result of his agency (t), and is a transaction the

by reason of its having been made without authority, the agent will not thereby be prevented from recovering upon a *quantum meruit*: *Craven-Ellis v. Canons, Ltd.*, [1936] 2 K. B. 403; 105 L. J. K. B. 767.

(p) *Cutter v. Powell* (1795), 6 T. R. 320; 3 R. R. 185.

(q) *Stubbs v. Holywell Ry.* (1867), L. R. 2 Ex. 311; 36 L. J. Ex. 166.

(r) *Read v. Rann* (1830), 8 L. J. (o.s.) K. B. 144; 10 B. & C. 438; *Broad v. Thomas* (1830), 7 Bing. 99; *Harley v. Nagata* (1917), 34 T. L. R. 124. Cp. *Moor Line v. Dreyfus*, [1918] 1 K. B. 89; 118 L. T. 87, C. A.; *Affrèteurs Reunis v. Walford*, [1919] A. C. 801; 88 L. J. K. B. 861, H. L.

(s) *Way and Waller v. Ryde*, [1944] 1 A. E. R. 9; 60 T. L. R. 185, C. A.

(t) Illustration 15. *Bray v. Chandler* (1856), 18 C. B. 718; *Jeffrey v. Crawford* (1890), 7 T. L. R. 618, C. A.; *Bayley v. Chadwick* (1878), 39 L. T. 429, H. L.; *Beable v. Dickerson* (1885), 1 T. L. R. 654.

bringing about of which was within the scope of his employment (*u*); but it is not necessary, in order to entitle him to payment of such remuneration, that he should complete the transaction, or even that he should be acting for the principal at the time of the completion thereof (*x*).

The question whether an agent is entitled to commission upon business arising wholly after his employment has ceased, as a result of his introduction, depends upon the nature and terms of his employment. *Prima facie*, he is not so entitled (*y*).

Illustrations.

1. A employs B, a broker, to procure a charterer for a ship. B introduces C, who is also a broker. C introduces D, who negotiates for, but does not enter into, a charterparty. D informs E that the ship is available; and E chartered the ship from A. B has no claim upon A for commission, the transaction being too remote a consequence of his introduction. A custom for a broker to be paid commission in such a case is invalid (*z*).

2. A house agent lets a house for a term of years, the tenant having the option of taking it for a further term. The tenant afterwards, through the intervention of another agent, takes the house for a further term at a different rent. The first-mentioned agent is not entitled to commission in respect of the further term, and a custom to pay commission to the original agent under such circumstances is invalid. He is entitled to commission only upon the rent obtained as a proximate consequence of his own acts (*a*).

3. An agent is employed to let an estate, and procures a tenant. The tenant subsequently buys the estate without any further communication with the agent. The agent is not entitled to any commission in respect of the sale (*b*).

4. An agent, employed to sell property on commission, is not entitled to commission upon a sale to himself, without express agreement to that effect (*c*).

5. An agent, employed to find a purchaser of property at a specified price, brings it to the notice of a Government department, which acquires it compulsorily, at a lower price and against the wish of the principal. The agent is not entitled to commission (*d*).

(*u*) Illustrations 3 and 4.

(*x*) Illustrations 6 to 14. *Wilkinson v. Martin* (1837), 8 C. & P. 1.

(*y*) Illustration 15. *Hilton v. Helliwell*, [1894] 2 Ir. R. 94; *Boyd v. Mathers* (1893), 9 T. L. R. 443, C. A.; *Morris v. Hunt* (1896), 12 T. L. R. 187; *Barrett v. Gilmour* (1901), 6 Com. Cas. 72; *Gerahty v. Baines* (1903), 19 T. L. R. 554; *Bickley v. Browning* (1913), 30 T. L. R. 134.

(*z*) *Gibson v. Crick* (1862), 31 L. J. Ex. 304; 1 H. & C. 142. Comp. *Wilkinson v. Alston* (1879), 48 L. J. Q. B. 733, C. A.

(*a*) *Curtis v. Nixon* (1871), 24 L. T. 706. See also *Ex p. Chatteris* (1874), 22 W. R. 289; *Lofts v. Bourke* (1884), 1 T. L. R. 58; *Millar v. Radford* (1903), 19 T. L. R. 575, C. A.

(*b*) *Toulmin v. Millar* (1887), 58 L. T. 96, H. L.; *Nightingale v. Parsons*, [1914] 2 K. B. 621; 83 L. J. K. B. 742, C. A.; *Mote v. Gould* (1934), 152 L. T. 347.

(*c*) *Hocken v. Waller* (1924), 29 Com. Cas. 296.

(*d*) *Hodges v. Hackridge Park Residential Hotel, Ltd.*, [1940] 1 K. B. 404; 109 L. J. K. B. 190, C. A.

6. A entered into an agreement with B in the following terms:—"In case of your introducing a purchaser (of a certain business) of whom I approve, or capital which I should accept, I could pay you five per cent. commission, provided no one else is entitled to commission in respect of the same introduction." B introduced C, who advanced £10,000 by way of loan, and B was duly paid his commission in respect of that advance. Some months afterwards, A and C entered into an agreement for a partnership, C advancing a further £4,000 by way of capital. Held, that B was not entitled to commission on the £4,000, that amount having been advanced in consequence of the negotiations between A and C for a partnership, with which B had nothing to do (e). It is not sufficient for the agent to show that the transaction would not have been entered into but for his introduction. He must show that the introduction is the direct cause of the transaction (e).

7. A, who was employed by B to find a purchaser of certain property, introduced C to B. Shortly afterwards B became bankrupt. Further negotiations took place between C and B's trustee in bankruptcy, resulting in a sale of the property. Held, that the sale was brought about by the agent's introduction and that he was entitled to prove in the bankruptcy for the amount of his commission (f).

8. An auctioneer and estate agent was employed to sell an estate, a reserve price being fixed, commission to be paid if the estate should be sold. He put it up for sale, but it was not sold. A person who attended the sale, afterwards asked the auctioneer who was the owner of the property, was referred by him to the principal, and eventually became the purchaser of the estate. Held, that the auctioneer was the *causa causans* of the sale, and was therefore entitled to his commission, although, before the actual sale, the vendor had withdrawn the property from him (g). An agent who brings about the relationship of buyer and seller is entitled to commission, though he does not actually complete the contract (g).

9. A house agent was instructed to offer a house for sale, and it was agreed that he should receive $2\frac{1}{2}$ per cent. commission on the price if he found a purchaser, or a guinea for his services if the house was sold without his intervention. A person called on the agent and obtained an order to view, but thought that the price was too high. The same person subsequently renewed negotiations with a friend of the principal's, and ultimately bought the house. Held, that there was evidence for the jury that the house was sold through the intervention of the agent, so as to entitle him to his commission (h).

10. A brewery company agreed to pay an agent commission on all licensed property it might purchase through his introduction. The company

(e) *Tribe v. Taylor* (1876), 1 C. P. D. 505; *Boyd v. Tovil Paper Co.* (1884), 4 T. L. R. 332, C. A.; *Millar v. Radford* (1903), 19 T. L. R. 575, C. A.

(f) *Ex p. Durrant, re Beale* (1888), 5 Morr. 37.

(g) *Green v. Bartlett* (1863), 32 L. J. C. P. 261; 14 C. B. (N.S.) 681; *Walker v. Fraser*, [1910] S. C. 222; *Burchell v. Gowrie, etc., Collieries*, [1910] A. C. 614; 80 L. J. P. C. 41.
(h) *Mansell v. Clements* (1874), L. R. 9 C. P. 139. See also *Barnett v. Brown* (1890), 6 T. L. R. 463; *Steere v. Smith* (1886), 2 T. L. R. 231; *Bayley v. Chadwick* (1878), 39 L. T. 429, H. L.; *Burton v. Hughes* (1885), 1 T. L. R. 207; *Thompson v. Thomas* (1896), 11 T. L. R. 304, C. A. Comp. *Brandon v. Hanna*, [1907] 2 Ir. R. 212, C. A.

promoted a new company, which acquired property introduced to the old company's notice by the agent. Held, that the new company being merely ancillary to the old, the agent was entitled to commission on the properties purchased (i).

11. An agent introduced a person to his principal as a possible purchaser of certain property, but no terms were arrived at. The principal subsequently sold the property by auction, the person introduced by the agent being the purchaser. Held, that the agent was not entitled to commission (k).

12. A agreed to pay B a commission of £5,000 in the event of B introducing a purchaser of A's business. B failed to find a purchaser, but introduced C, an accountant, as a person who might be able to introduce a purchaser. C eventually himself bought the property at the proposed price after deducting the commission which he was to have been paid in the event of his finding a purchaser. Held, that there was no evidence that B had introduced a purchaser of the business, he having introduced C, not as a purchaser, but as an agent to find a purchaser, and that B could not recover either the agreed commission or a *quantum meruit*, the claim for a *quantum meruit* being excluded by the express contract (l).

13. A employed B to sell an estate in lots. C bought certain lots, and B received commission thereon. A then withdrew B's authority, and C subsequently bought the remaining lots by private contract. Held, that the jury were entitled to find that the ultimate sale was not due to B's introduction (m). But if it appear that the agent's introduction is the foundation of the negotiations resulting in an ultimate sale, the principal cannot deprive him of his commission by withdrawing the property from his hands. The proper question for the jury is—"Did the sale really and substantially proceed from the agent's acts?" (n).

14. An agent claims commission for procuring a loan. It is not sufficient to show that the loan indirectly resulted from his intervention. He must show that it was obtained by means of the agency, from the parties to whom he applied. If third persons casually heard that a loan was wanted, and lent the money directly to the principal, the agent cannot claim commission thereon (o). Similarly, where an agent is employed to find a tenant (p).

15. An agent is employed to make inquiries concerning a particular business with a view to the purchase of it by his principal and upon the terms that the principal will pay a commission upon the purchase-price if the purchase should be transacted. If the principal and vendor are brought together by the agent, the commission is earned, although the purchase is ultimately effected through the intervention of another agent, provided that the agent's services are really instrumental in bringing about the transaction (q).

(i) *Gunn v. Showell's Brewery Co.* (1902), 50 W. R. 659, C. A.

(k) *Taplin v. Barrett* (1889), 6 T. L. R. 30.

(l) *Barnett v. Isaacson* (1898), 4 T. L. R. 645, C. A.

(m) *Lumley v. Nicholson* (1886), 34 W. R. 716.

(n) *Wilkinson v. Martin* (1837), 8 C. & P. 1.

(o) *Antrobus v. Wickens* (1865), 4 F. & F. 291.

(p) *Coles v. Enoch*, [1939] 3 A. E. R. 327, C. A.

(q) *Bow's Emporium v. Brett* (1927), 44 T. L. R. 194, H. L. (E.).

16. An agent is employed to sell goods on commission, and the principals agree "to allow him commission upon all orders executed by them and paid for by the customers arising from his introduction." He is entitled to commission on all orders executed for customers introduced by him, including orders received after his dismissal from the principals' employment (r). So, where the agreement was to pay commission on all accounts introduced by the agent, so long as the principals continued to do business with the persons he placed on their books, it was held that the commission continued to be payable to the agent's executors after his death (s). But, apart from express stipulation, the general rule is that a principal is not liable to pay commission upon orders sent by his agent's customers after the agent has ceased to represent him (t).

Article 66.

REMUNERATION WHERE THE PRINCIPAL ACQUIRES NO BENEFIT.

Subject to any express agreement or special custom (u), where the remuneration of an agent is payable upon the performance by him of a definite undertaking, he is entitled to be paid that remuneration as soon as he has substantially done all that he undertook to do, even if the principal acquire no benefit from his services, or the transaction in respect of which the remuneration is claimed fall through, provided that it does not fall through in consequence of any act or default of the agent (x).

Illustrations.

1. A employed B to procure a loan, and entered into the following agreement: "In the event of your obtaining me the sum of £2,000, or such other sum as I shall accept, I agree to pay you a commission of $2\frac{1}{2}$ per cent. on the amount received." B introduced A to a building society, who offered to lend £1,625 upon terms which were accepted by A. The transaction afterwards went off because A would not satisfy certain requirements of the society and failed to show a sufficient title to the property upon which the loan was to have been made. Held, that B was entitled to his commission of $2\frac{1}{2}$ per cent. upon £1,625, the amount the society offered to advance (y).

(r) *Bilbee v. Hasse* (1889), 5 T. L. R. 677; *Salomon v. Brownfield* (1896), 12 T. L. R. 239; *Robey v. Arnold* (1897), 14 T. L. R. 39.

(s) *Wilson v. Harper*, [1908] 2 Ch. 370; 77 L. J. Ch. 607; *Levy v. Goldhill*, [1917] 2 Ch. 297; 86 L. J. Ch. 693; cp. *Cramb v. Goodwin* (1919), 35 T. L. R. 477, C. A.

(t) *Nayler v. Yearsley* (1860), 2 F. & F. 41; *Weare v. Brimsdown Lead Co.* (1910), 103 L. T. 429; *Sales v. Crisp* (1913), 29 T. L. R. 491; *Marshall v. Glanville*, [1917] 2 K. B. 87; 86 L. J. K. B. 767.

(u) Illustration 7.

(x) Illustrations 1 to 6. *Webb v. Rhodes* (1837), 3 Bing. N. C. 732; 43 R. R. 790; *Moir v. Marten* (1891), 7 L. T. R. 330, C. A.; *Nosotti v. Auerbach* (1898), 79 L. T. 413. A *del credere* commission is due and payable immediately the contract in respect of which it is claimed is made. *Solly v. Weiss* (1818), 2 Moo. 420, Ex. Ch.; *Caruthers v. Graham* (1811), 14 East, 578.

(y) *Fisher v. Drewett* (1879), 48 L. J. Ex. 32, C. A. Comp. *Salter's claim* (1891), 7 T. L. R. 602; *Peacock v. Freeman* (1888), 4 T. L. R. 541, C. A.

2. An agent who was employed to borrow a certain sum upon leasehold security, found a person able and willing to lend that sum, but the transaction fell through in consequence of unusual covenants of which the agent had no knowledge. Held, that he was entitled to the whole of the agreed commission for procuring the loan (z). If an agent, employed to negotiate a loan, brings the principals together, and nothing more remains for him to do, he is entitled to his commission, even if the contract afterwards goes off without any default by his principal (a).

3. A employed B, an estate agent, to find a purchaser for A's property and agreed to pay commission on a sale being effected. B introduced C, who signed a contract to purchase but did not complete the purchase. Held, that B could not recover the commission, unless he could prove that C was able and willing to complete the purchase (b). So, where an agent introduced a person who made an offer which was accepted subject to a deposit being paid within a certain time, and the deposit was not paid within the time, it was held that no commission was due (c).

4. It was agreed that an agent should receive commission upon "all goods bought through him." He obtained an order for goods, which the principal accepted, but was unable to execute, so that no benefit resulted therefrom. Held, that the agent was entitled to commission upon the order (d). As a general rule, an agent is entitled to his commission whenever he procures a binding agreement with the principal (d).

5. A promised to pay B £5 if he should succeed in obtaining a purchaser for a lease at a certain price. B introduced C, who entered into a contract with A, and paid a deposit. C was unable to complete the purchase, and A permitted the contract to be cancelled, A retaining the deposit. Held, that B had substantially performed his undertaking, and was entitled to payment of the £5 promised (e). So, where property was sold at an auction to a purchaser who signed a contract and paid a deposit, but the contract was afterwards rescinded by the vendor in consequence of a requisition by the purchaser with which the vendor could not comply (f). But the agent has no right to commission in such a case, unless the contract made is complete and binding (g).

6. An agent was employed on commission to purchase certain property. He purchased the property, subject to his principal's solicitor's approval of the title. The principal broke off the transaction, and the title was never submitted to his solicitor. Held, that in order to maintain an action for

(z) *Green v. Lucas* (1876), 33 L. T. 584; 31 L. T. 731, C. A.

(a) *Fuller v. Eames* (1892), 8 T. L. R. 278. See judgment of Bramwell, L.J., in *Fisher v. Drewett*, *supra*; *Passingham v. King* (1898), 14 T. L. R. 392, C. A.

(b) *Martin v. Perry*, [1931] 2 K. B. 310; 100 L. J. K. B. 582; *James v. Smith* (1921), [1931] 2 K. B. 317, n.; 100 L. J. K. B. 585, n., C. A.; *Chapman v. Winson* (1904), 91 L. T. 17, C. A.

(c) *Musson v. Mozley*, [1936] 1 A. E. R. 64.

(d) *Lockwood v. Levick* (1860), 29 L. J. C. P. 340; 8 C. B. (n.s.) 603; *Hill v. Kitching* (1846), 15 L. J. C. P. 251; 3 C. B. 299; *Harris v. Petherick* (1878), 39 L. T. 543; *Vulcan Car Agency v. Fiat Motors* (1915), 32 T. L. R. 73.

(e) *Horford v. Wilson* (1907), 1 Taunt. 12; *Lara v. Hill* (1863), 15 C. B. (n.s.) 45; *Platt v. Depree* (1893), 9 T. L. R. 194; *Passingham v. King* (1898), 14 T. L. R. 392, C. A.

(f) *Skinner v. Andrews* (1910), 26 T. L. R. 340, C. A.

(g) *Grogan v. Smith* (1890), 7 T. L. R. 132, C. A.

the commission, the agent ought to show either that the principal's solicitor approved the title, or that such a title was submitted to him as he could not reasonably disapprove, and that unless the agent could prove that the seller had a good title, he could not recover the commission (*h*).

7. A promised to pay B $2\frac{1}{2}$ per cent. commission in the event of his finding a purchaser of certain land at the price of £3,000. B introduced C, who took a lease for 1,000 years at a yearly rent of £150, with an option to purchase the land, within twenty years, for £3,000. Held, that B had practically found a purchaser, and was therefore entitled to the commission (*i*).

8. An agent was employed to sell an advowson, and it was expressly agreed that the commission should be paid when the abstract of conveyance was drawn out. He found a purchaser, who entered into a contract, but the abstract was not delivered, and negotiations were dropped. Held, that the agent was not entitled to recover the commission, the event upon which it was to become payable not having happened (*k*). So, where it was agreed that commission should be paid "upon the sum which might be obtained," it was held that it could not be recovered until the principal had actually received the amount (*l*). So, if there be a trade custom whereby the agent is not entitled to commission unless the transaction in respect of which it is claimed be completed, he cannot recover the commission until completion, even if the transaction fall through in consequence of the principal's default (*m*).

9. *Costs of conducting suit, when payable*.—An undertaking by a solicitor to conduct a suit constitutes an entire contract, and he cannot maintain an action for the costs, nor does the Statute of Limitations commence to run against him, until the termination of the suit (*n*), except where he is discharged, or his retainer is repudiated, by the client (*o*); or where the client refuses to put him in funds for out-of-pocket expenses (*p*). But the principle of entire contract does not apply to such a matter as a bankruptcy or winding-up, or an administration (*q*), nor where the solicitor is retained to prosecute various proceedings (*r*).

(*h*) *Clack v. Wood* (1882), 9 Q. B. D. 276, C. A.

(*i*) *Rimmer v. Knowles* (1874), 30 L. T. 490; but see *Mote v. Gould* (1934), 152 L. T. 347, p. 121, *ante*.

(*k*) *Alder v. Boyle* (1847), 16 L. J. C. P. 232; 4 C. B. 635; *Lott v. Outhwaite* (1893), 10 T. L. R. 76, C. A.; *Chapman v. Winson* (1904), 91 L. T. 17, C. A.; *Henry v. Gregory* (1905), 22 T. L. R. 53.

(*l*) *Bull v. Price* (1831), 5 M. & P. 2; *Benningfield v. Kynaston* (1887), 3 T. L. R. 279, C. A.; *Martin v. Tucker* (1885), 1 T. L. R. 655; *Didcott v. Friesner* (1896), 11 T. L. R. 187, C. A.; *White v. Turnbull* (1898), 78 L. T. 726, C. A.; *Beale v. Bond* (1901), 84 L. T. 313, C. A.; *Foster's Agency v. Romaine* (1916), 32 T. L. R. 545, C. A.; *Knight v. Gordon* (1923), 39 T. L. R. 399; *French v. Leeton Shipping Co.*, [1922] 1 A. C. 451; 92 L. J. K. B. 537, H. L.; *Price v. Smith* (1929), 141 L. T. 490, C. A.

(*m*) *Read v. Rann* (1830), 10 B. & C. 438; 8 L. J. (o.s.) K. B. 144; *Broad v. Thomas* (1830), 7 Bing. 99. See Article 64, Illustration 6.

(*n*) *Whitehead v. Lord* (1852), 7 Ex. 691; 21 L. J. Ex. 239; *Harris v. Quine* (1869), L. R. 4 Q. B. 653; 38 L. J. Q. B. 33; *Underwood v. Lewis*, [1894] 2 Q. B. 306; 64 L. J. Q. B. 60, C. A.

(*o*) *Hawkes v. Cottrell* (1858), 27 L. J. Ex. 369; 3 H. & N. 243.

(*p*) *Wadsworth v. Marshall* (1832), 2 Cr. & J. 665; 1 L. J. Ex. 250; *Whitehead v. Lord*, *supra*.

(*q*) *Re Hall and Barker* (1878), 9 Ch. D. 538; 47 L. J. Ch. 621.

(*r*) *Warmingtons v. McMurray* (1937), 81 S. J. 178, C. A.

Article 67.

DAMAGES FOR WRONGFULLY PREVENTING AGENT FROM
EARNING REMUNERATION.

Where a principal, in breach of an express or implied contract with his agent(s), refuses to complete a transaction, or otherwise prevents the agent from earning his remuneration, the agent is entitled to recover, by way of damages, the loss actually sustained by him as a natural and probable consequence of such breach of contract (*t*). The measure of damages, where nothing further remains to be done by the agent, is the full amount that he would have earned if the principal had duly completed the transaction, or otherwise carried out his contract with the agent (*u*).

Where the authority of an agent is revoked by the principal, or the agency is otherwise determined, after it has been partially executed, or after the agent has endeavoured to execute it, the question whether the agent is entitled to any, and if so, to what remuneration for the work previously done, depends upon the nature and terms of his employment, and the custom or usage of the particular business in which he is employed (*x*).

Illustrations.

1. A agreed with B that, in consideration of B introducing a purchaser of certain property, A would pay to B a commission—the payment to be made on the completion of the purchase. B introduced C, who offered, “subject to contract,” to purchase at the price and upon the terms required by A, who accepted the offer, “subject to contract.” C was able and willing to enter into a binding contract and complete the purchase. A refused to enter into a binding contract with C, and disposed of the property otherwise. Held, that no stipulation could be implied in the agreement between A and B that A would sell or agree to sell the property to the person introduced by B, and that A was not liable in damages to B for having prevented him from earning his commission (*y*).

(s) Illustrations 1, 3, 9 and 10.

(t) Illustrations 1 to 14. *Vickers v. Church Extension Association* (1888), 4 T. L. R. 674.

(u) *Roberts v. Barnard* (1884), 1 C. & E. 336; *Harris v. Petherick* (1878), 39 L. T. 543. *Comp. Peacock v. Freeman* (1888), 4 T. L. R. 541, C. A.

(z) *Queen of Spain v. Parr* (1869), 39 L. J. Ch. 73; *Simpson v. Lamb* (1856), 25 L. J. C. P. 113; 17 C. B. 603. Illustration 11.

(y) *Luzor (Eastbourne), Ltd. v. Cooper*, [1941] A. C. 108; 110 L. J. K. B. 131, H. L. *Trollope v. Martin*, [1934] 2 K. B. 436; 103 L. J. K. B. 634, C. A.; and *Trollope v. Caplan*, [1936] 2 K. B. 382; 105 L. J. K. B. 819, C. A., were wrongly decided (*ibid.*), and this seems to apply to *Way & Waller, Ltd. v. Verrall*, [1939] 3 A. E. R. 533, and to *Harrods, Ltd. v. Geneen*, [1938] 4 A. E. R. 493, 55 T. L. R. 139, C. A. (where the judgment of MacKinnon, L.J., upon the question of consideration appears preferable to that of the majority). The decision in *Raymond v. Wooten* (1931), 47 T. L. R. 606, which was disapproved in *Trollope v. Martin*, *supra*, now appears to be correct. *Prickett v. Badger* (1856), 1 C. B. (N.S.) 296; 26 L. J. C. P. 33, was a decision upon its own special facts (see *Luzor (Eastbourne), Ltd. v. Cooper*, *supra*), and should not be treated as laying down

2. A agreed with B that, in consideration of B introducing to A a person who makes an offer of not less than a stipulated amount for A's property, A would pay to B a commission. B is entitled to his commission when this is done whether A accepts the offer and carries through the bargain or not (z).

3. A places his property in the hands of B for disposal. B accepts the employment and expends money and time in endeavouring to carry it out. Such a form of contract may well imply the term that the principal will not withdraw the authority he has given after the agent has incurred substantial outlay, or at any rate, after he has succeeded in finding a possible purchaser (z).

4. A contracted to employ B, and B to serve A, as agent for the sale of such goods as should be forwarded or submitted to B by sample from time to time, the agreement to be determined at the end of five years by notice from either party. Before the expiration of the five years, A's factory was burnt down, and the business was not resumed. Held, that there was no implied condition that the contract should determine on the destruction of the factory, and that B was entitled to substantial damages (a).

5. A and B agreed, in consideration of the services and payments to be mutually rendered and made, that for seven years, or so long as A should continue business at L, A should be sole agent there for the sale of B's coals. About four years afterwards B sold his colliery. Held, that B was under no obligation to continue the business, but only to employ A as agent for the sale of such coals as he might send to L, and that the agency necessarily determined when the subject-matter thereof was gone (b).

6. Ship brokers procured a time charter, upon the terms that they should be paid a commission on all hire earned under the charterparty. Before the end of the time provided for by the charterparty, the owners sold the vessel to the charterers and agreed to cancel the charterparty. Held, that there was no implied agreement that the owners would not so sell the vessel and cancel the charterparty, and that the ship brokers were not entitled to commission for any period after the cancellation, or to damages (c).

7. Ship brokers negotiated, on behalf of the owners, a charterparty containing an option for the charterers to purchase the ship during the charter period, for £125,000. The owners agreed with the ship brokers that should the option be exercised, the brokerage on the purchase should

any general principle (see per Lord Wright, *ibid.*, at p. 147). An agreement between estate agents to share the commission if one introduces a willing buyer of the property on the other's books, means, "If I earn my commission through you I will share with you what I so earn." (*Davis v. Trollope*, [1943] 1 A. E. R. 501, C. A.)

(z) *Luxor (Eastbourne), Ltd. v. Cooper*, *supra*, per Lord Simon, C., p. 120.

(a) *Turner v. Goldsmith*, [1891] 1 Q. B. 544; 60 L. J. Q. B. 247, C. A. See also *Emmens v. Elderton* (1852), 4 H. L. Cas. 624, H. L.; *Nielans v. Cuthbertson* (1891), 7 T. L. R. 516, C. A.; *Northey v. Trevillion* (1902), 7 Com. Cas. 201; *Warren v. Agadeshman* (1922), 38 T. L. R. 588.

(b) *Rhodes v. Forwood* (1876), 1 App. Cas. 256; 47 L. J. Ex. 396, H. L.; *Bovine v. Dent* (1904), 21 T. L. R. 82; *Lazarus v. Cairn Line* (1912), 106 L. T. 378. Comp. *Stirling v. Mailland* (1864), 34 L. J. Q. B. 1; 5 B. & S. 840.

(c) *French v. Leeston Shipping Co.*, [1922] 1 A. C. 451; 92 L. J. K. B. 537, H. L.; *White v. Turnbull* (1898), 78 L. T. 726, C. A.

be $3\frac{1}{2}$ per cent. During the currency of the charter, the owners sold the ship to the charterers for £85,000. Held, that the ship brokers were not entitled to commission, the option to purchase for £125,000 not having been exercised, and the ship brokers' negotiations not being the effective cause of the sale at £85,000; and that they could not recover upon a *quantum meruit*, in view of the express agreement (d).

8. A firm agreed to employ an agent for a specified term. During the term, one of the partners died. Held, that the parties contracted with reference to the existing partnership, subject to an implied condition that all the parties should so long live, and that, therefore, the agent was not entitled to damages from the other partners for refusing to continue the employment (e). Otherwise, if the partnership had been dissolved by agreement (f).

9. A company employed a broker to dispose of its shares, and agreed to pay him £100 down, and a further £400 on the allotment of all the shares. The broker disposed of a considerable number of the shares, and then the company was voluntarily wound up. Held, that the broker was prevented from earning the £400 by the act of the company, and was entitled to recover such damages for the breach of contract as the jury thought reasonable. The jury awarded him £250 (g).

10. A was engaged for a fixed term by a company as a traveller, and it was agreed that he should receive by way of remuneration a commission upon all orders obtained, but no salary. After A had established a connection, and before the expiration of the term for which he was engaged, the company wound up voluntarily. Held, that A was entitled to recover damages for the loss of the commission that he would have earned during the remainder of the term (h). It was pointed out that, had the case been otherwise decided, the company might have immediately commenced business again, and so obtained the benefit of A's connection without paying for it (h).

11. An agent was employed by an insurance company for a term of five years, at a fixed salary of £500 a year and a commission on the profits, the agent undertaking to transact no other business during the term. The company wound up voluntarily before the expiration of the term. Held, that the agent was not entitled to prove in the winding-up for prospective commission, the contract merely importing that a commission on the profits was to be paid if the company found it profitable to carry on the business, and chose to do so. Such a contract gives the agent no right to insist upon

(d) *Howard v. Manx Isles Steamship Co.*, [1923] 1 K. B. 110; 92 L. J. K. B. 233.

(e) *Tasker v. Shepherd* (1861), 30 L. J. Ex. 207; 6 H. & N. 575. *Comp. Phillips v. Hull Alhambra*, [1901] 1 K. B. 59; 70 L. J. K. B. 26.

(f) *Brace v. Calder*, [1895] 2 Q. B. 253; 64 L. J. Q. B. 582, C. A. But see *Bovine v. Dent* (1904), 21 T. L. R. 82.

(g) *Inchbald v. Western Neilgherry Coffee, etc., Co.* (1864), 34 L. J. C. P. 15; 17 C. B. (N.S.) 733.

(h) *Re Patent Floor Cloth Co., Dean and Gilbert's Claim* (1872), 41 L. J. Ch. 476. See also *Re London and Colonial Co., ex p. Clark* (1869), L. R. 7 Eq. 550; 38 L. J. Ch. 562; *Reigate v. Union Manufg. Co.*, [1918] K. B. 592; 87 L. J. K. B. 724.

the business being carried on (i). It will be observed that in this case, a salary was paid, whereas, in Illustration 10, the agent received commission only. But it is not easy to reconcile the decisions, and it would seem that each case must depend upon the presumed intention of the parties to be ascertained from the particular circumstances.

12. The articles of association of a company provided that in the event of the manager being dismissed for any cause other than gross misconduct, he should be paid a certain sum by way of compensation. Held, that he was entitled to prove for such sum in the winding-up of the company (k).

13. An agent was employed to sell an advowson. Before he succeeded in finding a purchaser, the principal sold it privately. Held, in an action for wrongful revocation of authority, that the agent was not entitled to recover anything, in the absence of evidence of expense incurred by him (l). Where the authority of an agent for sale is revoked before a sale is effected, the question whether he has a right to remuneration for what he has done in trying to effect a sale depends upon the terms of his employment. Unless there is an express contract to pay the agent remuneration for his trouble, or the circumstances are such as to show that that was the intention of the parties, he is not entitled to recover in such a case; at all events, without proof of damage (l).

14. "*Sole agents.*"—An owner of property appointed estate agents "sole agents for the sale of the property." He sold the property himself without the intervention of an agent. Held, that the estate agent was not entitled to commission or damages (m). But where the sale is effected through another agent, the "sole agent" is entitled to damages (n). And where the defendants appointed the plaintiff "sole agent for the sale of their goods" in a certain district, it was held that they were not entitled to sell in that district except through his agency (o).

Article 68.

NO REMUNERATION IN RESPECT OF UNLAWFUL OR WAGERING TRANSACTIONS.

No agent can recover any remuneration for his services unless at the time when the services were rendered he was legally

(i) *Re English and Scottish Marine Insurance Co., ex p. Maclure* (1870), L. R. 5 Ch. 737; 39 L. J. Ch. 685, Ch. App. See also *Re Newman, Raphael's Claim*, [1916] 2 Ch. 309; 85 L. J. Ch. 625, C. A.

(k) *Re London and Scottish Bank, ex p. Logan* (1870), L. R. 9 Eq. 149; *Re Imperial Wine Co., Shirreff's Case* (1872), L. R. 14 Eq. 417; 42 L. J. Ch. 5. See also *Re Dale and Plant* (1890), 6 T. L. R. 123, as to the right of a managing director to prove in such a case.

(l) *Simpson v. Lamb* (1856), 17 C. B. 603; 25 L. J. C. P. 113; 104 R. R. 806; *Noah v. Owen* (1886), 2 T. L. R. 364, C. A.; *Brinson v. Davies* (1911), 105 L. T. 134.

(m) *Bentall v. Vicary*, [1931] 1 K. B. 253; 100 L. J. K. B. 21.

(n) *Hampton & Sons, Ltd. v. George*, [1939] 3 A. E. R. 627. The damages must be estimated with reference to the probability that the "sole agent" would have earned the commission (*ibid.*).

(o) *Snelgrove v. Ellingham Colliery Co.* (1881), 45 J. P. 408. See also *Lamb v. Goring Brick Co.*, [1932] 1 K. B. 710; 101 L. J. K. B. 214, C. A., where "sole selling agents" were held not to be agents, but buyers, with the sole right to sell the goods of the manufacturers.

qualified to act in the capacity in which he claims the remuneration (*p*).

No agent can recover any remuneration in respect of any transaction which is obviously, or to his knowledge, unlawful (*q*), or in respect of any gaming or wagering contract or agreement rendered null and void by the Gaming Act, 1845 (*r*), or of any services in relation thereto or connection therewith (*s*).

Illustrations.

1. A solicitor cannot maintain an action for costs unless his certificate was in force at the time when the work for which the costs are claimed was done (*t*). So, an appraiser cannot maintain any action for remuneration as such, unless he was duly licensed to act in that capacity (*u*).

2. An action was brought for work performed and money expended in buying shares in a company which affected to act as a body corporate without authority by charter or statute, and was, therefore, illegal. Held, that the action was not maintainable, because it arose out of an unlawful transaction (*x*). So, a broker cannot recover commission for effecting a contract of marine insurance which is not contained in a duly stamped policy (*y*), or for effecting any illegal insurance (*z*), or in respect of an illegal sale of offices (*a*). An agreement to pay remuneration in respect of any such unlawful transaction is void (*a*). So, a stockbroker cannot recover commission or brokerage in respect of a purchase or sale of stock or shares, unless he send the principal a duly stamped contract note (*b*).

3. Commission was claimed by a broker for procuring freight. Held, that the fact that the charterparty, in respect of which the commission was claimed, would be illegal unless the charterer obtained certain licenses, was no answer to the action, it not being part of the broker's duty to see that the licenses were obtained (*c*).

4. The Gaming Act, 1892 (*d*), provides that any promise, express or implied, to pay any sum by way of commission, fee, or reward, or otherwise, in respect of any contract or agreement rendered null and void by the Gaming Act, 1845 (*e*), or of any services in relation thereto or connection

(*p*) Illustration 1.

(*q*) Illustrations 2 and 3. *Walker v. Nightingale* (1726), 4 Bro. P. C. 193.

(*r*) 8 & 9 Vict. c. 109.

(*s*) Gaming Act, 1892 (55 Vict. c. 9). Illustration 4.

(*t*) Solicitors Act, 1932 (22 & 23 Geo. 5, c. 37), s. 50. "Costs" includes fees, charges, disbursements, expenses and remuneration (*ibid.*), s. 81. *Re Brunswick and Crowl* (1849), 4 Ex. 492 19 L. J. Ex. 112; *Re Sweeting*, [1898] 1 Ch. 268; 67 L. J. Ch. 159.

(*u*) *Palk v. Force* (1848), 12 Q. B. 666; 17 L. J. Q. B. 299; see also Article 70, Illustration 3.

(*x*) *Josephs v. Pebrer* (1825), 3 B. & C. 639.

(*y*) Stamp Act, 1891 (54 & 55 Vict. c. 39), ss. 95, 97.

(*z*) *Allkins v. Jupe* (1877), 2 C. P. D. 375; 46 L. J. C. P. 824.

(*a*) *Stackpole v. Erle* (1761), 2 Wils. 133; *Waldo v. Martin* (1825), 4 B. & C. 319; 28 R. R. 289; *Parsons v. Thompson* (1790), 1 H. Bl. 322.

(*b*) Finance (1909—10) Act, 1910 (10 Edw. 7, c. 8, s. 78 (3)). *Learoyd v. Bracken*, [1894] 1 Q. B. 114; 63 L. J. Q. B. 96, is not now law.

(*c*) *Haines v. Rusk* (1814), 5 Taunt. 521.

(*d*) 55 Vict. c. 9.

(*e*) 8 & 9 Vict. c. 109.

therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum. Prior to this Act it was held that a plea of "gaming and wagering" was no answer to an action by a stockbroker for commission upon purchases and sales of stocks or shares, gaming and wagering contracts not being rendered unlawful by the Gaming Act, 1845 (e); but merely null and void (f).

Article 69.

NO REMUNERATION IN CASES OF MISCONDUCT OR BREACH OF DUTY.

No agent is entitled to remuneration—

- (a) in respect of any unauthorised transaction not ratified by the principal (g);
- (b) in respect of any transaction entered into by him in violation of the duties arising from the fiduciary character of the relationship between him and the principal, even if the transaction be adopted by the principal (h);
- (c) where he has been guilty of wilful breach of duty or misconduct in the course of the agency (i); or
- (d) where the principal derives no benefit from his services, in consequence of his negligence or other breach of duty (k).

Illustrations.

1. A is employed on commission to procure a loan upon certain terms. Before anything is done the principal varies the terms. A is unable to procure the loan on the terms as varied, but obtains an offer on the original terms, which the principal refuses to accept. A is not entitled to any commission (l).

2. An agent is employed on commission to sell certain property. His authority is revoked by the death of the principal, but he subsequently sells the property, and the principal's executors confirm the sale. The agent is not entitled to recover the agreed commission from the executors unless they ratify and recognise the terms of his employment, but he may be entitled upon a *quantum meruit* (m).

(e) 8 & 9 Vict. c. 109.

(f) *Knight v. Fitch* (1855), 24 L. J. C. P. 122; 15 C. B. 566. As to what are deemed to be gaming and wagering contracts in stocks or shares, see Article 72, Illustration 7.

(g) Illustrations 1 to 4. *Gillow v. Aberdare* (1893), 9 T. L. R. 12, C. A.; *Keay v. Fenwick* (1876), 1 C. P. D. 745, C. A. And see *Beaumont v. Boulbee* (1805), 11 Ves. 358. As to ratification, see Article 32, Illustration 12.

(h) Illustration 5. *Etna Insurance Co., Re Owens* (1873), 7 Ir. R. Eq. 235, 424; *Gray v. Haig* (1854), 20 Beav. 219. And see Articles 50 *et seq.*

(i) Illustrations 5 to 11. *White v. Chapman* (1815), 1 Stark. 113; *Hurst v. Holding* (1810), 3 Taunt. 32; *Palmer v. Goodwin* (1862), 13 Ir. Ch. R. 171; *Re Hereford Waggon Co.* (1876), 2 Ch. D. 621; 45 L. J. Ch. 461, C. A.

(k) Illustrations 12 to 14. *Money Penny v. Hartland* (1824), 1 C. & P. 352; *Duncan v. Blundell* (1820), 3 Stark. 6.

(l) *Toppin v. Healey* (1863), 11 W. R. 466.

(m) *Campanari v. Woodburn* (1854), 24 L. J. C. P. 13; 15 C. B. 400.

3. A solicitor was retained by the managing partner of a firm to recover a partnership debt. Pending the action commenced for that purpose, two dormant partners retired, but no notice of the retirement was given to the solicitor. It was held that, the contract on the retainer being to conduct the action to its termination unless abandoned for good cause, and no notice having been given by the retiring partners not to continue the action on their behalf, they were liable to the solicitor for the costs incurred subsequently to the date of the retirement (n).

4. An auctioneer, who is employed to sell property by auction, sells it by private contract. He is not entitled to commission (o).

5. An agent, who is employed to sell certain land, sells it to a company in which he is a director and large shareholder. He is not entitled to commission upon the sale, even if it be adopted and confirmed by the principal (p). So, if an agent for sale fraudulently take a secret commission from the purchaser, he is not only accountable to the principal for such secret commission, but is not entitled to remuneration from the seller, and if the seller pay him commission in ignorance of the facts, he is entitled to recover it (q).

6. A solicitor, having undertaken the conduct of a suit, abandons it without reasonable cause, or without giving his client reasonable notice of his intention to do so. He is not entitled to recover any costs, even for the work already done (r). So, a solicitor cannot recover his costs for conducting a suit, unless he has given the client the benefit of his personal judgment and superintendence (s). So, where a solicitor and confidential agent neglected to keep regular and proper accounts, he was deprived of his costs and charges (t).

7. A shipmaster is guilty of habitual drunkenness, or other wilful misconduct, during his employment. He thereby forfeits his wages (u).

8. An auctioneer, employed to sell property on the terms that he should be paid a certain commission and out-of-pocket expenses, received discounts from printers and advertisers, and charged the principal in full without deducting the discounts, in the honest belief that he was entitled to retain them. It was held that, though he must account for the discounts, he was entitled to commission, as he had not acted fraudulently (x). So, where a commission agent fraudulently overcharged his principal in respect of some transactions, but acted honestly in other separate and distinct transactions,

(n) *Court v. Berlin*, [1897] 2 Q. B. 396; 66 L. J. Q. B. 714, C. A.

(o) *Marsh v. Jelf* (1862), 3 F. & F. 234.

(p) *Salomans v. Pender* (1865), 3 H. & C. 639; 34 L. J. Ex. 95.

(q) *Andrews v. Ramsay*, [1903] 2 K. B. 635; 72 L. J. K. B. 865. And see *Price v. Metropolitan House Investment, etc., Co.* (1907), 23 T. L. R. 630, C. A.; *Rhodes v. Macalister* (1923), 29 Com. Cas. 19, C. A.

(r) *Whitehead v. Lord* (1852), 7 Ex. 691; 21 L. J. Ex. 239; *Nicholls v. Wilson* (1843), 11 M. & W. 106; 12 L. J. Ex. 266; *Van Sandau v. Browne* (1832), 9 Bing. 402; 2 L. J. C. P. 34; *Underwood v. Lewis*, [1894] 2 Q. B. 306; 64 L. J. Q. B. 60, C. A.

(s) *Hopkinson v. Smith* (1822), 1 Bing. 13.

(t) *White v. Lincoln* (1803), 8 Ves. 363. *Comp. Re Lee, ex p. Neville* (1868), L. R. 4 Ch. 43.

(u) *The Macleod* (1880), 5 P. D. 254; *The Dunmore* (1875), 32 L. T. 340; *The Roebuck* (1874), 31 L. T. 274; *The Atlantic* (1863), 7 L. T. 647.

(x) *Hippisley v. Knee*, [1905] 1 K. B. 1; 74 L. J. K. B. 68.

it was held that he was entitled to commission on the transactions in which he had acted honestly (y).

9. An agent, employed to find a purchaser, procured an offer, which the vendor accepted, subject to contract. Subsequently, a higher offer was made by another party to the agent, which he failed to communicate to the vendor, and the vendor concluded a contract with the person whose offer had been accepted. The vendor recovered as damages from the agent the difference between the price fixed by the concluded contract and the higher offer. Held, that, in the circumstances, the agent was entitled to commission on the price so fixed and the damages (z).

10. The estate department of a company acting for the vendor of a house introduced a purchaser, and, in ignorance of the agency, the building department of the company acted for the purchaser and made a report on the house which had the effect of reducing the price. Held, that the vendor having sold the house to the purchaser so introduced, was liable for the commission, notwithstanding the company's breach of duty in acting for the purchaser (a).

11. An agent was employed by a lessee to find a purchaser of leasehold premises which were subject to a covenant prohibiting the carrying on of any business other than that of a music-seller without the consent of the lessor. Several tailors made offers to the lessee to buy the premises for £2,500, but the lessee believing that the lessor would not consent, did not approach him upon the matter. The agents, having an offer from a tailor of £2,250 and having obtained an assurance from the lessor that he would consent to a tailor's business being carried on upon the premises, concealed from the lessee the fact that the lessor had so assured his consent and the nature of the business of the person making the offer, and induced the lessee to accept £2,250. Held, that the agent was not entitled to any commission (b).

12. A broker is employed to negotiate a contract for the hire of a vessel. The contract goes off in consequence of his negligence or default. He is not entitled to recover any remuneration, or even the expenses incurred by him (c). If an agent perform his duties so negligently that no benefit results from his services, he is not entitled to any remuneration whatever (d).

13. An auctioneer, who was employed to sell an estate, negligently omitted to insert in the conditions of sale a proviso usually inserted therein, and in consequence of the omission the sale was rendered nugatory. Held, that he was not entitled to any compensation or remuneration for his services although the particulars of the sale had been submitted to the principal, and were not objected to by him (e).

14. A solicitor, who was retained to prosecute an appeal, neglected to see that the appeal was duly entered, and failed to give notice thereof, as required

(y) *Nitedals Taendstikfabrik v. Bruster*, [1906] 2 Ch. 671; 75 L. J. Ch. 798.

(z) *Keppel v. Wheeler*, [1927] 1 K. B. 577; 96 L. J. K. B. 433, C. A.

(a) *Harrods, Ltd. v. Lemon*, [1931] 2 K. B. 157; 100 L. J. K. B. 219, C. A.

(b) *Heath v. Parkinson* (1926), 136 L. T. 128.

(c) *Dalton v. Irwin* (1830), 4 C. & P. 289.

(d) *Hamond v. Holiday* (1824), 1 C. & P. 384; *Hill v. Featherstonhaugh* (1831), 7 Bing. 569; 33 R. R. 576.

(e) *Denew v. Daverell* (1813), 3 Camp. 451.

by statute. At the subsequent sessions the justices refused to entertain the appeal. Held, that the solicitor was not entitled to recover any costs (*f*) So, if a solicitor, in conducting a suit, commit a negligent act whereby all the previous steps become useless in the result, he cannot recover costs for any part of the work done (*g*); and, generally, in the taxation of costs as between solicitor and client, the taxing master ought to disallow any costs occasioned by the negligence or ignorance of the solicitor (*h*).

Sect. 2.—*Rights of Reimbursement and Indemnity.*

Article 70.

INDEMNITY FROM LIABILITIES, AND REIMBURSEMENT OF EXPENSES, INCURRED IN COURSE OF AGENCY.

Subject to the provisions of Articles 71 and 72, every agent has a right against his principal, founded upon an implied contract, to be indemnified against all losses and liabilities, and to be reimbursed all expenses, incurred by him in the execution of his authority (*i*); and where the agent is sued for money due to his principal, he has a right to set off the amount of any such losses, liabilities, or expenses, unless the money due to the principal is money which was deposited with the agent for a specific purpose which has failed, or is the balance of money, so deposited, which remains after such purpose has been fulfilled (*k*).

An agent who makes advances to his principal has a right of action, as well as a lien, for such advances; provided that a *del credere* agent cannot sue for advances which are covered by sums due to the principal the payment whereof he has guaranteed (*l*).

Illustrations.

1. A employs B to find a purchaser for certain bark. C agrees with B to purchase the bark, subject to its being equal to sample. B, being offered a *del credere* commission by A, accepts A's draft for the price of the bark,

(*f*) *Huntley v. Bulwer* (1839), 6 Bing. N. C. 111. See also *Long v. Orsi* (1856), 26 L. J. C. P. 127; 18 C. B. 610.

(*g*) *Bracey v. Carter* (1840), 12 Ad. & E. 373; *Stokes v. Trumper* (1855), 2 Kay & J. 232; *Cox v. Leach* (1857), 26 L. J. C. P. 125; 1 C. B. (n.s.) 617; *Shaw v. Arden* (1832), 2 L. J. C. P. 1; 9 Bing. 287.

(*h*) *Re Massey and Carey* (1884), 26 Ch. D. 459; 53 L. J. Ch. 705, C. A.; *Thwaites v. Mackerson* (1828), 3 C. & P. 341; *Black v. Creighton* (1828), 2 Moll. 552; *Re Clarke* (1851), 1 De G. M. & G. 43; 21 L. J. Ch. 20; *Alsop v. Oxford* (1833), 2 L. J. Ch. 174; 1 Myl. & K. 564.

(*i*) Illustrations 1 to 10. *Thacker v. Hardy* (1878), 4 Q. B. D. 685; 48 L. J. Q. B. 289, C. A.; *Tophis v. Crane* (1839), 5 Bing. N. C. 636; *Campbell v. Larkworthy* (1894), 9 T. L. R. 528, C. A.; *Paule v. Gunn* (1838), 7 L. J. C. P. 206; 4 Bing. N. C. 445; *Adams v. Morgan*, [1924] 1 K. B. 751; 93 L. J. K. B. 382, C. A.

(*k*) Illustrations 9 to 12. *Alsager v. Currie* (1844), 13 L. J. Ex. 203; 12 M. & W. 751.

(*l*) *Graham v. Ackroyd* (1852), 22 L. J. Ch. 1046; 10 Hare, 192.

and in due course pays the amount of the draft. C then refuses the bank as not being equal to sample. B is entitled to recover from A the amount of the draft paid by him (m). But where a factor sold goods and took a bill of exchange payable to himself from the buyer, sending his own promissory note for the net proceeds to his principal, without disclosing the buyer's name, it was held that, upon the buyer's insolvency, the factor could not recover from the principal the amount of the promissory note which the factor had paid to a holder who had taken the note from the principal (n).

2. A instructs B, a stockbroker, to buy and sell various shares and stock, intending to receive or pay the differences. B is entitled to recover the amount of any losses paid by him at A's request in respect of such shares or stock, although he did not make separate contracts on behalf of A, but appropriated to him portions of larger amounts of shares and stock, which he bought as principal with a view of dividing it amongst various clients for whom he was acting (o).

3. A purchased shares as a broker, not being duly licensed as the law then required. Held, that he was entitled to recover from the principal the price of the shares, which he was compelled to pay, such payment not being an essential part of the duty of a broker, although, in consequence of not being licensed, he could not recover any commission or remuneration (p).

4. A stockbroker incurs liabilities on the Stock Exchange on behalf of his principal. The stockbroker subsequently pays a composition on the amount of his debts (including such liabilities), and by a rule of the Stock Exchange he cannot be sued for the balance of such debts without the permission of the committee. The principal is bound to indemnify him to the full extent of the liabilities incurred on his behalf. The implied contract to indemnify an agent extends to all liabilities incurred by him, not merely to actual losses (q).

5. An auctioneer is instructed to sell certain property, and after he has contracted liabilities in reference to his employment, his authority is revoked by the principal. The principal must indemnify him against the liabilities (r).

6. An agent incurs damages and expenses in defending an action on behalf of his principal. He is entitled to reimbursement of such damages and expenses if he was acting within the scope of his authority in defending the action, and the loss was not caused by his own default (s). Where an agent, exercising his best judgment, compromised an action brought against

(m) *Hooper v. Treffrey* (1847), 1 Ex. 17; 16 L. J. Ex. 233.

(n) *Simpson v. Swan* (1812), 3 Camp. 291.

(o) *Ex p. Rogers, re Rogers* (1880), 15 Ch. D. 207, C. A. See also *May v. Angeli* (1898), 14 T. L. R. 551, H. L.; Article 41, Illustration 10. *Comp. Skelton v. Wood* (1895), 71 L. T. 616.

(p) *Smith v. Lindo* (1858), 27 L. J. C. P. 335; 5 C. B. (N.S.) 587, Ex. Ch.

(q) *Lacey v. Hill, Crowley's claim* (1870), L. R. 18 Eq. 182; 43 L. J. Ch. 551.

(r) *Warlow v. Harrison* (1858), 1 El. & El. 295, 309, Ex. Ch.; *Brittain v. Lloyd* (1845), 15 L. J. Ex. 43; 14 M. & W. 762.

(s) *Frizzone v. Tagliaferro* (1855), 10 Moo. P. C. C. 175, P. C.; *Re Wells* (1895), 72 L. T. 359; *The James Seddon* (1866), L. R. 1 Ad. 62; 35 L. J. Ad. 117; *Williams v. Lister* (1913), 109 L. T. 699, C. A. See also *Re Fatatina Development Corpn.*, [1914] 2 Ch. 271; 84 L. J. Ch. 48, C. A.

him in respect of a contract made on behalf of the principal, who had notice of the action, and had not given any instructions as to the course to be pursued, it was held that the agent was entitled to indemnity, although the plaintiff could not, in the circumstances, have succeeded in the action (t).

7. An auctioneer in Paris was instructed by A, in London, to advertise for sale a thoroughbred mare, entered and described in the English Stud Book under the name of Pentecost. The auctioneer advertised accordingly, and a Frenchman, who owned a mare of the same name, sued and recovered damages from him in France, for injury alleged to have been suffered in consequence of A's mare having been advertised by the same name. It was held that A was not liable to indemnify the auctioneer against the loss, because, the description in the advertisement being a true description, the loss could not be said to have been incurred in consequence of any act of the auctioneer in pursuance of his employment, but in consequence of the erroneous decision of the French Court (u).

8. An accommodation bill is drawn and accepted for the purpose of raising money for the benefit of the drawer and acceptor. The drawer instructs a bill broker to get the bill discounted. It is the common practice for bill brokers to give a general guarantee to the bankers who discount their bills, and not to indorse each bill discounted on behalf of their customers. The bill is dishonoured, and the broker becomes liable to the bankers upon such a guarantee. The broker is entitled to recover from the acceptor the amount that he is compelled to pay in pursuance of such guarantee, with interest, it being a liability incurred in the execution of his authority in the ordinary course of his business as a bill broker (x).

9. A broker, in accordance with a reasonable custom of the particular market in which he was employed, rendered himself personally responsible for the price of goods bought on behalf of his principal, and duly paid for the goods. Held, that he was entitled to set off the amount so paid, in an action by the principal's trustee in bankruptcy for money due to the principal (y).

10. An agent, who had general authority to receive and sell goods on behalf of the principal, in good faith brought an action against a third person who wrongfully withheld possession of the goods. In an action by the principal for the proceeds of the goods it was held that the agent was entitled to set off the amount of the costs incurred by him in the proceedings to recover the goods (z).

11. *Right of set-off by insurance brokers.*—Where an insurance broker is sued by the trustee of a bankrupt underwriter for premiums due to the bankrupt, the broker has a right to set off the amount of any losses, or returns of premiums, due from the bankrupt in respect of any policy effected

(t) *Peltman v. Keble* (1850), 19 L. J. C. P. 325; 9 C. B. 701. See also *Broom v. Hall* (1859), 7 C. B. (N.S.) 503.

(u) *Halbroun v. International Horse Agency*, [1903] 1 K. B. 270; 72 L. J. K. B. 90. But *quære* whether this decision is sound. See *Williams v. Lister* and *Re Famulina Development Corpn.*, *supra*.

(x) *Re Fox, ex p. Bishop* (1880), 15 Ch. D. 400; 50 L. J. Ch. 18, C. A.

(y) *Cropper v. Cook* (1868), L. R. 3 C. P. 194. Comp. *Morris v. Cleasby* (1816), 4 M. & S. 566.

(z) *Curtis v. Barclay* (1826), 5 B. & C. 141.

by the broker in his own name on behalf of his principal, provided that the broker, by reason of having acted under a *del credere* commission or otherwise, is personally interested in the payment of such losses or returns of premiums; because such transactions are mutual dealings within the meaning of the Bankruptcy Acts (*a*). But he has no right of set-off in respect of any policy effected in the name of the principal (*b*); nor in respect of any policy effected in his own name, unless he has a personal interest in the payment of amount claimed to be set off (*c*).

12. If the particular purpose for which money is deposited with an agent fail, or if a balance remain after such purpose is fulfilled, the agent must return the money or balance to his principal and is not entitled to set off a debt due to him from the principal (*d*).

Article 71.

LIABILITIES INCURRED UNDER RULES OR USAGES OF PARTICULAR MARKETS.

Where an agent is authorised to deal at a particular place, or in a particular market, he is entitled to be indemnified by the principal against all losses and liabilities, and to be reimbursed all expenses, incurred by him in the execution of his authority under the rules or regulations, or according to the customs or usages, of that place or market (*e*). Provided, that no principal incurs any liability in consequence of any unreasonable rule, regulation, custom, or usage, unless he had notice thereof at the time when he conferred the authority on the agent (*f*).

Illustrations.

1. A authorised B, a broker in Liverpool, to sell certain shares. B sold the shares to C, who was also a broker. A failed to deliver the shares, and B therefore bought some on the market and completed the contract with C. By the usage of Liverpool, of which A had knowledge, it was customary for brokers to render themselves personally liable when contracting with each

(*a*) *Lee v. Bullen* (1858), 8 El. & Bl. 692, n.; *Bize v. Dickason* (1786), 1 T. R. 285; *Koster v. Eason* (1813), 2 M. & S. 112; *Parker v. Beasley* (1814), 2 M. & S. 423; *Davies v. Wilkinson* (1828), 4 Bing. 573. Comp. *Elgood v. Harris*, [1896] 2 Q. B. 491; 66 L. J. Q. B. 53. There is no such right of set-off in an action by the representatives of a deceased underwriter: *Houstoun v. Robertson* (1816), 6 Taunt. 448; *Houstoun v. Bordenave* (1816), 6 Taunt. 451; *Beckwith v. Bullen* (1858), 8 E. & B. 683; 27 L. J. Q. B. 162.

(*b*) *Koster v. Eason* (1813), 2 M. & S. 112; *Peele v. Northcote* (1817), 7 Taunt. 478.

(*c*) *Minett v. Forrester* (1811), 4 Taunt. 541; *Parker v. Smith* (1812), 16 East, 382; *Goldschmidt v. Lyon* (1812), 4 Taunt. 534; *Baker v. Langhorn* (1816), 6 Taunt. 519.

(*d*) *Stumore v. Campbell*, [1892] 1 Q. B. 314; 61 L. J. Q. B. 463, C. A.; *Re Mid-Kent Fruit Factory*, [1896] 1 Ch. 567; 65 L. J. Ch. 250.

(*e*) Illustrations 1 to 13. *Sentance v. Hawley* (1863), 13 C. B. (n.s.) 458; *Harker v. Edwards* (1887), 57 L. J. Q. B. 147, C. A.; *Sutton v. Tatham* (1839), 10 Ad. & E. 27; 8 L. J. Q. B. 210; *Stock Advance Co. v. Galmoye* (1887), 3 T. L. R. 808, C. A. See also Article 41.

(*f*) Illustrations 11 and 12. *Blackburn v. Mason* (1893), 68 L. T. 510 C. A.; *Robinson v. Mollett* (1874), L. R. 7 H. L. 802; 44 L. J. C. P. 362. See also Article 39.

other. Held, that A was liable to B for the loss incurred by him in completing the contract (g).

Usages of the Stock Exchange.

2. A employs B, a stockbroker, to purchase shares on the Stock Exchange. B purchases the shares, and is compelled to refund to the seller the amount of a "call" which the latter had to pay in order to enable him to transfer the shares. A must indemnify B (h).

3. A employs B to sell stock subject to the rules of the Stock Exchange. B sells the stock, and it is transferred to the buyer. It is afterwards discovered that the signature on the transfer is a forgery, and the Committee of the Stock Exchange decide that, according to the rules, B must replace the stock. The rule is a reasonable one, and A must indemnify B, whether he was aware of the rule or not (i).

4. A employs B, a stockbroker, to purchase, for the next settling day, shares in a bank. Before the settling day the bank stops payment and goes into liquidation. A gives notice to B not to pay for the shares. B nevertheless pays for them, he being bound to do so by the rules of the Stock Exchange. A must indemnify B even if the directors of the bank refuse to consent to a transfer of the shares (k).

5. A employs B, a stockbroker, to purchase shares in a company. On settling day A gives B the name of an infant transferee, to whom the shares are transferred. The company is subsequently wound up, and the name of the infant is struck out and that of the transferor substituted as a contributory. The Stock Exchange Committee order B to indemnify the transferor, and B does so. A must indemnify B (l).

6. A employs B, a stockbroker, to buy, for next settling day, shares in a company. Before the settling day the company is being wound up under a statute which provides that every transfer of shares after the commencement of the winding-up shall be void unless the Court otherwise orders. B pays for and takes a transfer of the shares on settling day, in accordance with the rules of the Stock Exchange. A must indemnify B (m). So, where, in similar circumstances, a broker contracts to sell shares, and by reason of the refusal of the principal to execute a transfer, is compelled to buy other shares at a higher price, in order to carry out the contract, the principal is bound to indemnify the broker against the loss (n).

7. A employs B, a stockbroker, to purchase shares. B purchases the shares, but the transfer, in consequence of the winding-up of the company,

(g) *Bayliffe v. Butterworth* (1847), 1 Ex. 425; *Johnston v. Usborne* (1841), 11 A. & E. 549. And see *Pollock v. Stables* (1848), 12 Q. B. 765; 17 L. J. Q. B. 352.

(h) *Bayley v. Wilkins* (1849), 7 C. B. 886; 18 L. J. C. P. 273.

(i) *Reynolds v. Smith* (1893), 9 T. L. R. 474, H. L.; affirming *Smith v. Reynolds*, 66 L. T. 808, C. A.

(k) *Taylor v. Stray* (1857), 26 L. J. C. P. 287; 2 C. B. (N.S.) 175, 197, Ex. Ch.; *Marten v. Gibbon* (1875), 33 L. T. 561, C. A.; *Hunt v. Chamberlain* (1896), 12 T. L. R. 186, C. A.; *Walter v. King* (1897), 13 T. L. R. 270, C. A.

(l) *Peppercorne v. Clench* (1872), 26 L. T. 656.

(m) *Chapman v. Shepherd* (1867), L. R. 2 C. P. 228; 36 L. J. C. P. 113.

(n) *Bideman v. Stone* (1867), L. R. 2 C. P. 504; 36 L. J. C. P. 198.

cannot be registered. B is compelled to indemnify the seller against "calls," according to the rules of the Stock Exchange. A must indemnify B (o).

8. A, a stockbroker, upon B's instructions, buys seventy shares for special settlement. Only twenty of the shares are delivered in time according to the rules of the Stock Exchange, and A pays for them. By the usage of the Stock Exchange a buyer is bound to accept and pay for a partial delivery, which is valid *pro tanto*. The usage is reasonable, and B must indemnify A (p).

9. A employs B, a stockbroker, to sell bonds. B sells the bonds, and pays the proceeds to A. The bonds are subsequently discovered to be unmarketable, and B, in accordance with the rules of the Stock Exchange, takes them back and repays the price to the purchaser. A must repay the price to B (q).

10. By the usage of the Stock Exchange, a broker who contracts, as such, to buy stock is justified in immediately reselling the stock in the event of the death, bankruptcy, or insolvency of the principal. A broker who so acts is entitled to recover from the principal or his representatives the amount of any loss incurred on the resale (r).

11. A employs B, a stockbroker, to purchase shares in a joint stock banking company. B purchases the shares and sends a contract note to A, in which the numbers of the shares are not inserted as required by Leeman's Act (s), the contract, therefore, being void in law. Before the settling day, A repudiates the contract. B nevertheless duly completes the contract, and pays for the shares, to avoid being declared a defaulter and expelled from the Exchange, it being the usual custom for members of the Stock Exchange to ignore Leeman's Act. If A had notice of the custom when he employed B, he must indemnify B (t). But if A had no notice of the custom, and was not aware that, by the rules of the Exchange, B was bound to complete such a contract (u), or if he knew neither of Leeman's Act nor of the custom (x), he is not bound to indemnify B, because the custom is an unreasonable one.

12. A instructs B, his broker, to carry over certain stock to the next settlement, but fails, after receiving due notice of the amount, to pay on the current pay day the balance due for differences, or to place sufficient security at B's disposal. By the usage of the Stock Exchange, a broker may in such a case close the principal's account. B closes A's account, according to usage, and sues him for the losses. The usage is reasonable, and A must indemnify B, whether he had notice of the usage or not (y). And the broker

(o) *Hodgkinson v. Kelly* (1868), L. R. 6 Eq. 496; 37 L. J. Ch. 837.

(p) *Benjamin v. Barnett* (1903), 19 T. L. R. 564; but see Article 72, Illustration 11.

(q) *Young v. Cole* (1837), 3 Bing. N. C. 724; 6 L. J. C. P. 201. Comp. *Westropp v. Solomon* (1849), 19 L. J. C. P. 1; 8 C. B. 345.

(r) *Lacey v. Hill, Crowley's claim* (1870), L. R. 18 Eq. 182; 43 L. J. Ch. 551; *Scrimgeour's claim* (1870), L. R. 8 Ch. 921; 42 L. J. Ch. 657, Ch. App.; *Re Overwey, Haas v. Durant*, [1900] 1 Ch. 209; 69 L. J. Ch. 255.

(s) Banking Companies (Shares) Act, 1867 (30 & 31 Vict. c. 29).

(t) *Seymour v. Bridge* (1885), 14 Q. B. D. 460; 54 L. J. Q. B. 347.

(u) *Perry v. Barnett* (1885), 15 Q. B. D. 388; 54 L. J. Q. B. 466, C. A.

(x) *Coates v. Pacey* (1892), 8 T. L. R. 474, C. A.

(y) *Davis v. Howard* (1890), 24 Q. B. D. 691; 59 L. J. Q. B. 133; *Druce v. Levy* (1891), 7 T. L. R. 259.

is entitled in such a case to close some of the transactions and keep others open, provided that he acts reasonably in the interests of his principal and of himself (z). Where a broker informed his principal that he would not be able to carry over shares bought on his account, and the principal said that he could not find the money to take them up, it was held that the broker was justified in carrying over as many of the transactions as he could and closing the others (a).

13. A, a stockbroker, is instructed by B to buy shares. A buys the shares but B fails to carry out the contract, and A has to pay for them. A has a fair price fixed by a jobber, and goes through the form of selling the shares and buying them back again on his own account. The price being fair, and having been fixed at a reasonable time, it is immaterial that A bought the shares back on his own account, and B must indemnify A against the loss (b) subject to a deduction of any profit A may have made by reason of the sale and re-purchase having been effected in one transaction (c).

Article 72.

NO INDEMNITY OR REIMBURSEMENT IN RESPECT OF UNLAWFUL WAGERING, OR UNAUTHORISED TRANSACTIONS, OR OF LIABILITIES OR EXPENSES INCURRED IN CONSEQUENCE OF OWN DEFAULT.

No agent is entitled to indemnity against any losses or liabilities, or reimbursement of any expenses incurred by him—

- (a) in respect of any act or transaction which is obviously, or to his knowledge, unlawful, except where he is entitled to contribution towards damages for which he is liable in tort (d);
- (b) in respect of any gaming or wagering contract or agreement rendered null and void by the Gaming Act, 1845 (e);
- (c) in respect of any unauthorised act or transaction not ratified by the principal (f);
- (d) in consequence of his own negligence, default, insolvency, or breach of duty (g).

(z) *Morten v. Hilton, Gibbes and Smith* (1908), [1937] 2 K. B. 176, n.; 106 L. J. K. B. 857, n., H. L.; *Samson v. Frazier, Jelke & Co.*, [1937] 2 K. B. 170; 106 L. J. K. B. 854. It appears from these cases that *Samuel v. Rowe* (1892), 8 T. L. R. 488, is not good law.

(a) *Cullum v. Hodges* (1901), 18 T. L. R. 6, C. A.

(b) *Macoun v. Erskine*, [1901] 2 K. B. 493; 70 L. J. K. B. 973, C. A.; *Walter v. King* (1897), 13 T. L. R. 270, C. A.; *Re Finlay*, [1913] 1 Ch. 564; 82 L. J. Ch. 295, C. A.; *Christoforides v. Terry*, [1924] A. C. 566; 93 L. J. K. B. 481, H. L.

(c) *Erskine v. Sachs*, [1901] 2 K. B. 504; 70 L. J. K. B. 978, C. A.

(d) Illustrations 1 to 5.

(e) 8 & 9 Vict. c. 109; Gaming Act, 1892 (55 Vict. c. 9). Illustrations 6 and 7.

(f) Illustrations 8 to 13. *Frizzone v. Tagliaferro* (1856), 10 Moo. P. C. C. 175, P. C.; *Cootes v. Pacey* (1892), 8 T. L. R. 474, C. A.; *Service v. Bain* (1893), 9 T. L. R. 95, C. A.; *Re Overweg, Haas v. Durant*, [1900] 1 Ch. 209; 69 L. J. Ch. 255.

(g) Illustrations 14 to 17. *Simpson v. Swan* (1812), 3 Camp. 291; *Frizzone v. Tagliaferro*, *supra*; *Skyring v. Greenwood* (1825), 4 B. & C. 281; *Holt v. Markham*, [1923] 1 K. B. 504; 92 L. J. K. B. 406, C. A.; *Davison v. Fernandes* (1890), 6 T. L. R. 73; *Solloway v. McLaughlin* [1938] A. C. 247; 107 L. J. P. C. 1, P. C. As to contribution between tortfeasors, see Illustration 5; Article 107.

Illustrations.

1. An agent expends money on behalf of his principal in purchasing shares in a company, which affects to act as a body corporate without authority by charter or statute, and which is, therefore, an illegal company. The agent is not entitled to recover from the principal the amount so expended, because the transaction is obviously unlawful (*h*).

2. A broker effects an illegal insurance on behalf of his principal, and pays the premium. He is not entitled to recover from the principal the amount of the premium, or any other payments made by him in respect of such insurance (*i*). Nor is a broker or other agent entitled to reimbursement or indemnity in respect of any contract of marine insurance which is not contained in a duly stamped policy (*k*).

3. An election agent makes payments which are illegal under the Corrupt Practices Acts. He cannot recover the amount of any such payments from the candidate employing him (*l*).

4. A employs B to purchase smuggled goods. B purchases the goods and pays for them. B cannot recover the price from A, even if A obtain possession of the goods (*m*).

5. A instructs B, an auctioneer, to sell goods of which A has no right to dispose, B having no knowledge of any defect in A's title. B sells the goods, and duly pays over the proceeds to A. B is afterwards compelled to pay to the true owner the value of the goods. A must indemnify B, the transaction not being obviously, or to B's knowledge, unlawful (*n*). The rule that a tortfeasor could not recover upon either an express or implied promise of indemnity by the person at whose request or on whose behalf the tort was committed (*o*), was confined to cases where the tortious act was obviously unlawful, and did not apply when there was a *bona fide* doubt about the matter (*p*). By the Law Reform (Married Women and Tortfeasors) Act, 1935 (*q*), s. 6, any tortfeasor liable in respect of damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which contribution is sought. The amount of contribution is such as the Court may find just and equitable having regard to the extent of responsibility for the damage; and the Court has power to exempt from liability or direct a complete indemnity. The section

(*h*) *Josephs v. Pebrer* (1825), 3 B. & C. 639.

(*i*) *Allkins v. Jupe* (1877), 2 C. P. D. 375; 46 L. J. C. P. 824; *Ex p. Mather* (1797), 3 Ves. 373.

(*k*) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 97.

(*l*) *Re Parker* (1882), 21 Ch. D. 408; 52 L. J. Ch. 159, C. A.

(*m*) *Ex p. Mather* (1797), 3 Ves. 373.

(*n*) *Adamson v. Jarvis* (1827), 4 Bing. 66.

(*o*) See *Shackell v. Rosier* (1836), 5 L. J. C. P. 193; 2 Bing. N. C. 634; *Scott v. Brown*, [1892] 2 Q. B. 724; 61 L. J. Q. B. 738, C. A.; *Smith v. Clinton* (1909), 99 L. T. 840.

(*p*) *Bette v. Gibbins* (1834), 4 L. J. K. B. 1; 2 A. & E. 57; *Toplis v. Grane* (1839), 5 Bing. N. C. 636; *Cory v. Lambton* (1917), 86 L. J. K. B. 401, C. A.

(*q*) 25 & 26 Geo. 5, c. 30. See Article 107.

does not render enforceable any agreement for indemnity which would not have been enforceable if the section had not been passed.

6. A makes a bet with B, and loses. C, at A's request and on his behalf, pays B the amount of the bet. C cannot recover the amount from A (r), in consequence of the Gaming Act, 1892 (s), s. 1, which provides that any contract, express or implied, to pay any person any sum paid (t) by him under or in respect of any contract or agreement rendered null and void by the Gaming Act, 1845 (u), shall be null and void, and no action shall be brought or maintained to recover any such sum. Gaming and wagering contracts are not unlawful, but merely void, and prior to the Act of 1892 it was held that money paid by an agent in pursuance of such a contract was recoverable from the principal, even if he had repudiated the transaction before the money was actually paid, the agent being entitled to be indemnified against the moral liability incurred by him in executing his authority (x). So, before the Act of 1892, a plea of "gaming and wagering" was no answer to an action by a stockbroker for differences paid on his client's behalf (y).

7. A, intending to speculate, employs a broker to buy and sell stock on the Stock Exchange, the broker being aware that A does not intend to accept the stock bought, or deliver the stock sold, on his behalf, but expects the broker to arrange that only differences shall be paid or received. The broker makes the contracts on A's behalf, and becomes personally liable on them. The broker is entitled to indemnity, because the transactions entered into by him on the Stock Exchange are real contracts for the purchase and sale of stock, and not gaming or wagering contracts (z). But if the broker agree with the persons with whom he contracts on behalf of his principal, or if it be the intention of both parties to the contract that no stock or shares shall be bought or sold, but only differences paid or received, it is none the less a wagering contract because there is a provision that either party may at his option require completion (a). On the other hand, if either party intend that stock or shares shall be delivered and paid for, the contract

(r) *Tatam v. Reeve*, [1893] 1 Q. B. 44; 62 L. J. Q. B. 30; *Jasson v. Cole* (1910), 26 T. L. R. 468.

(s) 55 & 56 Vict. c. 9.

(t) Includes any sum to be paid: *Levy v. Warburton* (1901), 70 L. J. K. B. 708.

(u) 8 & 9 Vict. c. 109; see s. 18.

(x) *Read v. Anderson* (1884), 13 Q. B. D. 779; 53 L. J. Q. B. 532, C. A. (bets paid by a turf commission agent). The Act is not retrospective: *Knight v. Lee*, [1893] 1 Q. B. 41; 62 L. J. Q. B. 28.

(y) *Rosewarne v. Billing* (1863), 33 L. J. C. P. 55; 15 C. B. (N.S.) 316; *Hannan v. Beeton* (1889), 5 T. L. R. 703, C. A.

(z) *Thacker v. Hardy* (1878), 4 Q. B. D. 685; 48 L. J. Q. B. 289, C. A.; *Re Hewett*, ex p. *Paddon* (1893), 9 T. L. R. 166, C. A.; *Forget v. Ostigny*, [1895] A. C. 318; 64 L. J. P. C. 62, P. C.; *Ex p. Phillips* (1861), 30 L. J. Bk. 1; *Ex p. Marnham* (1861), 30 L. J. Bk. 3; *Lightbody v. Rahbula* (1895), 12 T. L. R. 102; *Hirst v. Williams* (1895), 12 T. L. R. 128, C. A.; *Franklin v. Dawson* (1913), 29 T. L. R. 479; *Barnett v. Sanker* (1925), 41 T. L. R. 660; *Weddle v. Hackett*, [1929] 1 K. B. 321; 98 L. J. K. B. 243; *Woodward v. Wolfe* (1936), 80 S. J. 976. As to the validity of options, see *Buitenlandsche Bankvereeniging v. Hildensheim* (1903), 19 T. L. R. 641, C. A.; *Sadd v. Foster* (1897), 13 T. L. R. 207, C. A.

(a) *Grizewood v. Blane* (1851), 11 C. B. 526, 538; *Universal Stock Exchange v. Strachan*, [1896] A. C. 166; 65 L. J. Q. B. 429, H. L.; *Re Gieve*, [1899] 1 Q. B. 794; 68 L. J. Q. B. 509, C. A.; *Philip v. Bennett* (1901), 18 T. L. R. 129; *Wood v. Fevez* (1898), 14 T. L. R. 492.

is not a wagering contract, even if it provide for the payment of an enhanced price in the event of the stock or shares being taken up (b).

8. A authorises B, a broker, to effect a marine insurance policy. After the underwriters have signed the slip, but before a binding contract is made, A revokes B's authority. B, nevertheless, effects the policy, and pays the premiums. B cannot recover the premiums from A, having acted without authority (c). In consequence of the Stamp Act, 1891 (d), ss. 93, 96 and 97, a contract of marine insurance does not become binding, at law or in equity, until the policy is subscribed by the underwriters (c). But a contract of fire insurance is complete and binding immediately the underwriters initial the slip (e).

9. A authorises B and C to insure his life in their names. They insure in the names of B, C and D, and pay the premiums. They are not entitled to recover the amount of the premiums from A, not having strictly pursued their authority (f).

10. A, a broker, contracted on behalf of B to sell certain shares to C. In consequence of the non-delivery of the shares, C bought against B, without having tendered a transfer to him, and A paid C the difference although B had given him express notice not to do so. Held, that C could not have recovered the difference until a transfer had been tendered by him, and that as A had paid the amount without B's authority, he was not entitled to indemnity from B. Otherwise, if the payment had been made in discharge of a liability incurred by A (g).

11. A, a stockbroker, by B's instructions, buys seventy shares for special settlement. Owing to difficulties in connection with the transfer, only twenty of the shares are delivered in time according to the rules of the Stock Exchange. The Committee resolve that A is to pay for the other fifty shares when delivered, and A accordingly takes delivery and pays for them. B is not liable to indemnify A, the shares not having been delivered in accordance with the contract (h). The Committee of the Stock Exchange have no power to alter a contract so as to bind non-members (i).

12. A, an outside broker, being instructed by B to buy and sell various stocks, without B's consent appropriates to B's account certain stocks held by himself, and from time to time sells and repurchases other stocks bought by him on B's behalf. A is not entitled to recover from B any differences in respect of the stocks so appropriated or dealt with without his consent (k). So, where a broker, besides charging commission, added a small percentage

(b) *Philip v. Bennett* (1901), 18 T. L. R. 429.

(c) *Warwick v. Slade* (1811), 3 Camp. 127; *Fisher v. Liverpool Ins. Co.* (1874), L. R. 9 Q. B. 418; 43 L. J. Q. B. 114, Ex. Ch.; *Home Marine Ins. Co. v. Smith*, [1898] 2 Q. B. 351; 67 L. J. Q. B. 777.

(d) 55 & 56 Vict. c. 39.

(e) *Thompson v. Adams* (1889), 23 Q. B. D. 361.

(f) *Barron v. Fitzgerald* (1840), 6 Bing. N. C. 201; *Service v. Bain* (1893), 9 T. L. R. 95, C. A.

(g) *Boulby v. Bell* (1846), 16 L. J. C. P. 18; 3 C. B. 284; *Howard v. Tucker* (1831), 1 B. & Ad. 712; 35 R. R. 418.

(h) *Benjamin v. Barnett* (1903), 19 T. L. R. 564.

(i) *Ibid.*; *Union Corp'n. v. Charrington*, (1902) 8 Com. Cas. 99.

(k) *Skelton v. Wood* (1895), 71 L. T. 616.

to the contract prices, it was held that the principal was entitled to repudiate the transactions, and not merely to an allowance of the overcharges, because the broker had not in fact made the contracts in respect of which indemnity was claimed, but had made other contracts at different prices (l).

13. A draws a cheque on his banker. The amount of the cheque is altered without A's authority, and the banker, in good faith, pays the increased amount. The banker is only entitled to charge A with the amount for which the cheque was originally drawn (m), unless A is estopped, by his negligence or otherwise, from denying the validity of the cheque as altered (n). Similarly, where a banker pays a cheque which has been altered as to the name of the payee, he cannot debit his customer with the amount of the cheque (o).

14. A solicitor undertook a prosecution for perjury, and agreed that he would only charge out-of-pocket expenses. The prosecution failed in consequence of the negligent way in which the indictment was drawn. Held, that the solicitor was not entitled to recover the disbursements (p). So, an agent is not entitled to be indemnified against a loss incurred by him in consequence of his own mistake on a point of law as to which he ought to have been competent (q).

15. A stockbroker is instructed by his principal to carry over stock to the next settlement. Before the next settling day the broker becomes insolvent and is declared a defaulter, in consequence of which the stock is sold at a loss. The principal is not bound to indemnify the broker, the loss having been caused by the broker's insolvency (r).

16. A stockbroker, having bought stock on his principal's behalf for the following settlement, wrongfully sold it before settling day without the principal's authority. The stock was at a higher price on settling day than when it was sold, but lower than the price at which it was bought. Held, that the broker was not entitled to indemnity, even subject to an allowance for damages for the breach of duty in selling without authority (s).

17. A broker is instructed to buy shares, and becomes a defaulter before settling day. He informs his principal that he may have the contract

(l) *Stange v. Lowitz* (1898), 14 T. L. R. 498, C. A.; *Johnson v. Kearley*, [1908] 2 K. B. 514; 77 L. J. K. B. 904, C. A.; *Nicholson v. Mansfield* (1901), 17 T. L. R. 259; *Thompson v. Meade* (1891), 7 T. L. R. 698. Comp. *Stubbs v. Slater*, [1910] 1 Ch. 632; 79 L. J. Ch. 420, C. A.; *Henderson v. Martin* (1912), 48 Ir. L. T. 13; *Aston v. Kelecy*, [1913] 3 K. B. 314; 82 L. J. K. B. 817, C. A.; *Blaker v. Hawes* (1913), 109 L. T. 320.

(m) *Colonial Bank of Australasia v. Marshall* (1906), 75 L. J. P. C. 76, P. C.; *Hall v. Fuller* (1826), 5 B. & C. 750; *Halifax Union v. Wheelwright* (1875), L. R. 10 Ex. 183; 44 L. J. Ex. 121; *British Linen Co. v. Caledonian Ins. Co.* (1861), 4 Macq. 107, H. L.; *Kepitigalla Rubber Estates v. National Bank of India*, [1909] 2 K. B. 1010; 78 L. J. K. B. 904; *Walker v. Manchester, etc., Banking Co.* (1913), 108 L. T. 728. As to countermending payment of a cheque by telegram, see *Curtice v. London, etc., Bank*, [1908] 1 K. B. 293; 77 L. J. K. B. 341, C. A.

(n) *London Joint Stock Bank v. Macmillan*, [1918] A. C. 777, H. L.; *Young v. Grote* (1827), 5 L. J. (o.s.) C. P. 165.

(o) *Slingsby v. District Bank*, [1932] 1 K. B. 544; 101 L. J. K. B. 281.

(p) *Lewis v. Samuel* (1846), 8 Q. B. 685; 15 L. J. Q. B. 218. See also *Thomas v. Atherton* (1878), 10 Ch. D. 185; 48 L. J. Ch. 370, C. A.

(q) *Capp v. Topham* (1805), 6 East, 392.

(r) *Duncan v. Hill*, *Duncan v. Beeson* (1873), L. R. 8 Ex. 242; 42 L. J. Ex. 179, Ex. Ch.; *Allen v. Wingrove* (1901), 17 T. L. R. 261, C. A.

(s) *Ellis v. Pond*, [1898] 1 Q. B. 426; 67 L. J. Q. B. 345, C. A.

completed (the jobber is bound to complete in such a case if the principal wish), or may consider it closed at the official price at the time of the broker's default. The principal elects the latter alternative. He is bound to indemnify the broker against the loss, having ratified the closing of the transaction before settling day (*t*).

Sect. 3.—*Lien*.

Article 73.

DEFINITIONS OF GENERAL AND PARTICULAR POSSESSORY LIENS.

A possessory lien is the right of a person who has possession of goods or chattels belonging to another, to retain possession thereof until the satisfaction of some debt or obligation by the owner of the goods or chattels.

Where the right is to retain possession in respect of a general balance of account, or until the satisfaction of debts or obligations incurred independently of the goods or chattels subject to the right, it is called a general lien.

Where the right is confined to debts and obligations incurred in respect of the goods or chattels subject to the right, it is called a particular lien.

Article 74.

POSSESSORY LIEN OF AGENTS.

Every agent has a general or particular possessory lien on the goods and chattels of his principal in respect of all lawful claims he may have as such agent against the principal, either for remuneration earned, or advances made, or losses or liabilities incurred, in the course of the agency, or otherwise arising in the course of the agency (*u*), provided—

- (1) that the possession of the goods or chattels was lawfully obtained by him in the course of the agency (*x*), and in the same capacity as that in which he claims the lien (*y*);
- (2) that there is no agreement inconsistent with the right of lien (*z*); and
- (3) that the goods or chattels were not delivered to him

(*t*) *Hartas v. Ribbons* (1889), 22 Q. B. D. 254, C. A.

(*u*) Illustrations 1 to 9.

(*x*) Illustrations 7 and 10.

(*y*) Illustrations 9, 11, 16 and 17.

(*z*) Illustrations 12 and 13. *Cowell v. Simpson* (1809), 16 Ves. 280; 10 R. R. 181; *Bock v. Gorriessen* (1861), 30 L. J. Ch. 39; *Crawshaw v. Homfray* (1820), 4 B. & A. 50; 22 R. R. 618.

with express directions, or for a special purpose, inconsistent with the right of lien (a).

The possessory lien of every agent is a particular lien only, except where he has a general lien by agreement, express or implied, with his principal (b). Such an agreement may be implied from a course of dealing between the principal and agent, or from an established custom or usage (b). Factors (c), insurance brokers (d), stockbrokers (e), solicitors (f), bankers (g), wharfingers (h), and packers (i), have a general lien by implication from custom.

Illustrations.

1. An auctioneer who is employed to sell goods has a lien on the goods for his charges and commission (k).

2. Books and papers are intrusted to a parliamentary agent by the clerk of the trustees of a public road, for the purpose of obtaining a renewal of their Act of Parliament. The agent has a lien on the books and papers for the amount of his bill of costs (l).

3. A carries on a business in his own name as agent for B. B becomes bankrupt. A, being liable to the creditors of the business by reason of his having carried it on in his own name, has a lien upon the goods and chattels in his possession belonging to B to the extent of such liability (m).

4. A carries on a business in his own name as agent for B, and deals with the possession of the goods of such business as if he were the owner thereof. He accepts certain bills of exchange drawn by B. Both become bankrupt. A's trustee in bankruptcy has a lien upon the goods in A's possession to the extent of A's liability upon current bills as well as for other amounts due to him from B (n).

5. A factor accepts bills of exchange on the faith of a consignment of goods, which are duly delivered to and sold by him. The principal dies during the currency of some of the bills. The factor has a lien upon the proceeds of the goods for the amount of the bills not yet due, as well as for

(a) Illustrations 14 to 17.

(b) *Bock v. Gorrisen* (1861), 30 L. J. Ch. 39; *Rushforth v. Hadfield* (1806), 7 East, 224; *Holderness v. Collinson* (1827), 7 B. & C. 212.

(c) *Baring v. Corrie* (1818), 2 B. & A. 137; *Godin v. London Assurance Co.* (1758), 1 W. Bl. 103. And see Illustrations 5, 6, 9, 11 and 12.

(d) *Snook v. Davidson* (1809), 2 Camp. 218; *Mann v. Forrester* (1814), 4 Camp. 60; *Westwood v. Bell* (1815), 4 Camp. 349.

(e) *Jones v. Peppercorne* (1858), 28 L. J. Ch. 158; *Johns*, 430; *Re London and Globe Finance Corpn.*, [1902] 2 Ch. 416; 71 L. J. Ch. 893; *Hope v. Glendinning*, [1911] A. C. 419; 80 L. J. P. C. 193, H. L.

(f) See pp. 151 *et seq.*, *post.*

(g) *London Chartered Bank v. White* (1879), 4 App. Cas. 413; 48 L. J. P. C. 75, P. C.; *Jourdain v. Lefevre* (1793), 1 Esp. 66. Illustrations 11, 12 and 14.

(h) *Naylor v. Mangles* (1794), 1 Esp. 109; *Spears v. Hartley* (1798), 3 Esp. 81.

(i) *Re Witt, ex p. Shubrook* (1876), 2 Ch. D. 489; 45 L. J. Bk. 118, C. A.

(k) *Williams v. Millington* (1788), 1 H. Bl. 81.

(l) *Ridgway v. Lees* (1856), 25 L. J. Ch. 584.

(m) *Fozcraft v. Wood* (1828), 4 Russ. 487.

(n) *Re Fawcus, ex p. Buck* (1876), 3 Ch. D. 795.

the amount of those which he has paid (o). So, a factor who becomes a surety for his principal has a lien upon the proceeds of goods sold by him, for the amount guaranteed (p).

6. An agent was appointed by a company to sell goods on their behalf in a shop taken for that purpose, and it was agreed that he should from time to time accept bills representing the value of the goods in his hands for sale. Goods were consigned to the agent, and he accepted a bill for their value. Before the bill became due, the company was wound up, and the liquidators took possession of and sold the goods. Held, that the agent, having paid the bill, had a lien upon the goods for the amount, and was entitled to be repaid out of the proceeds thereof in preference to the other creditors of the company (q).

7. *Goods or chattels must be in agent's possession.*—A bought goods as a factor for and on behalf of B, and it was agreed that the goods should remain upon the premises of the seller at a rent to be paid by B. After a time, A was requested by the seller to remove the goods, but did not do so. Subsequently, without B's authority or instructions, A removed the goods to his own premises, and about the same time a petition in bankruptcy was presented against B. Held, that the possession of the goods continued in B, and that A had therefore no lien upon them (r). So, where a factor accepted bills upon the faith of a consignment of goods, and both he and the principal became bankrupt before the arrival of the cargo, it was held that the factor's trustee in bankruptcy had no lien upon the cargo, and therefore no claim against the principal's trustee, who had sold the cargo and received the price, because the goods had never been in the factor's possession (s). Constructive possession of goods by the agent is, however, sufficient for the purpose of establishing his lien thereon (t). And an agreement, made for valuable consideration, to hand over a bill of lading to an agent for the purpose of giving him a security on the goods represented thereby, gives the agent a right, in equity, to the bill of lading and possession of the goods, as against the principal and his creditors (u).

8. *Goods in the order and disposition of the principal.*—A was appointed by a Glasgow firm to manage a warehouse in London, and it was expressly agreed that he should have a lien upon the goods stored in the warehouse. The business was carried on, and the goods were stored, in the name of the firm, who became bankrupt. Held, that the goods were in the order and disposition of the firm, and that in consequence of the "order and disposition" clause of the Bankruptcy Act, A's lien was not effective, though he had physical custody and control of the goods (x).

(o) *Hammonds v. Barclay* (1802), 2 East, 227; *Pulteney v. Keymer* (1800), 3 Esp. 182.

(p) *Drinkwater v. Goodwin* (1775), Cowp. 251.

(q) *Re Pavy's Felted Fabric Co.* (1876), 1 Ch. D. 631; 45 L. J. Ch. 318.

(r) *Taylor v. Robinson* (1818), 2 Moo. 730.

(s) *Kinloch v. Craig* (1790), 3 T. R. 119, 783, H. L.

(t) *Bryans v. Nix* (1839), 4 M. & W. 775; 8 L. J. Ex. 137.

(u) *Ex p. Barber* (1843), 3 M. D. & De G. 174; *Lutscher v. Comptoir d'Escompte* (1876), 1 Q. B. D. 709.

(x) *Hoggard v. Mackenzie* (1858), 25 Beav. 493. See Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 38 (2) (c).

9. *Debt or obligation must be incurred in course of the agency.*—A, a factor sold goods in his own name on B's behalf to C. C subsequently sent goods to A for sale, never having employed him as a factor before. C became bankrupt. Held, that A had no lien upon C's goods for the price of the goods sold by him on B's behalf. The lien of an agent is confined to what is due to him as such agent, and does not extend to a debt incurred before the commencement of the agency (y).

10. *The goods or chattels must be obtained lawfully.*—A lien cannot be acquired by a wrongful act. If an agent obtain goods from his principal by misrepresentations, he has no lien thereon, though the circumstances in other respects be such that he would have had a lien if the goods had been obtained lawfully (z). So, where an agent of the managing owner of a ship made the freight payable to himself without authority to do so, it was held that he had no lien on the freight received by him for a debt due from the principal (a).

11. *The goods or chattels must be acquired in the same capacity as that in which the lien is claimed.*—A factor insures a ship on his principal's behalf, the transaction being quite distinct and separate from his duties as factor. His general lien does not extend to the policy of insurance, because he did not acquire it in the capacity of factor (b). So, if a policy be left merely for safe custody in an agent's hands, he has no general lien thereon for advances (c). And a banker's lien for the general balance due to him is confined to property deposited with him in the capacity of a banker, and does not extend, e.g., to boxes of securities left with him merely for safe custody (d). But it extends to all bills, cheques, and money paid into the bank, and to all documents and securities deposited with him as a banker (d).

12. *Must be no agreement inconsistent with the lien.*—A life policy was deposited at a bank, with a memorandum charging it with overdrafts not exceeding a specified amount. Held, that the banker's general lien was excluded by the special contract, such contract being inconsistent with the existence of a general lien on the policy (e). So, where a partner deposited a lease with a banker to secure a particular advance to his firm, it was held that the banker had no lien thereon for the general balance due from the firm (f). If a factor expressly agree to deal in a particular way with the proceeds of goods deposited with him for sale, his general lien is thereby excluded (g). But the lien is not excluded unless the express contract be

(y) *Houghton v. Matthews* (1803), 3 B. & P. 485.

(z) *Madden v. Kempster* (1807), 1 Camp. 12.

(a) *Walshe v. Provan* (1853), 8 Ex. 843; 22 L. J. Ex. 355.

(b) *Dixon v. Stanfield* (1850), 10 C. B. 398.

(c) *Muir v. Fleming* (1823), D. & R. N. P. C. 29.

(d) *Misa v. Currie* (1876), 1 App. Cas. 554; 45 L. J. Ex. 852, H. L.; *London Chartered Bank v. White* (1879), 4 App. Cas. 413; 48 L. J. P. C. 75, P. C.; *Scott v. Franklin* (1812), 15 East, 428.

(e) *Re Bowes, Strathmore v. Vane* (1886), 33 Ch. D. 586; 56 L. J. Ch. 143. See also *Ex p. M'Kenna* (1861), 30 L. J. Bk. 20; 3 De G. F. & J. 629; *Vanderzee v. Willis* (1789), 3 Bro. C. C. 21.

(f) *Wolstenholm v. Sheffield Bank* (1886), 54 L. T. 746.

(g) *Walker v. Birch* (1795), 6 T. R. 258.

clearly inconsistent with its existence (h). Thus, where certain securities were deposited with stockbrokers for a specific loan, and they were given a power of sale, it was held that their general lien extended to such securities (i). So, an agreement that there shall be monthly settlements does not affect the lien of an insurance broker for premiums upon policies in his hands (k). And the general lien of a factor is not excluded merely because he acts under special instructions to sell in his principal's name and at a particular price (l).

13. A consigns goods to B, who transfers the bill of lading to his factor C, to secure £1,000. B becomes bankrupt. C has no lien on the bill of lading for a general balance due from B, and A may stop the goods *in transitu*, subject to C's claim for £1,000 (m).

*No Lien on Property Intrusted to Agent for Special Purpose
Inconsistent Therewith.*

14. Certain exchequer bills were deposited at a bank, to be kept in a box under lock and key, the key being kept by the customer. The bills were subsequently intrusted to the banker, with instructions to obtain the interest on them, and get them exchanged for new bills, and to deposit the new bills in the box as before. Held, that the banker's lien did not attach to the original bills or to those for which they were exchanged, the special purpose for which they were placed in his hands being inconsistent with a right of general lien (n).

15. A consigns goods to B for sale, and in sending B the bill of lading tells him that those goods will cover a bill of exchange which he has drawn in favour of C, and asks him to duly honour such bill. C presents the bill to B, who refuses to accept it. The cargo duly arrives, and A becomes bankrupt. B cannot claim a general lien on the cargo, unless he pays the bill of exchange (o). Where an agent accepts goods with express directions to apply them or their proceeds in a particular way, he cannot set up his general lien in opposition to those directions (o). So, if A send bills to B with instructions to discount them, and apply the proceeds for a particular purpose, and B does not discount them, but receives the amount thereof after A has become bankrupt, A's trustee in bankruptcy is entitled at his option to recover the value of the bills in trover, or to recover the proceeds as money had and received to his use, and B has no right to set off a debt due to him from A (p).

(A) *Brandao v. Barnett* (1846), 12 C. & F. 787, H. L.; *Re European Bank, Agra Bank's claim* (1872), L. R. 8 Ch. 41; *Davis v. Bowsher* (1794), 5 T. R. 488.

(i) *Jones v. Peppercorne* (1858), Johns. 430; 28 L. J. Ch. 158. See also *Re London and Globe Finance Corpn.*, [1902] 2 Ch. 416; 71 L. J. Ch. 893.

(k) *Fisher v. Smith* (1878), 4 App. Cas. 1; 48 L. J. Ex. 411, H. L.

(l) *Stevens v. Biller* (1883), 25 Ch. D. 31; 53 L. J. Ch. 249, C. A.; *König v. Brandt* (1901), 84 L. T. 748, C. A.

(m) *Spalding v. Ruding* (1843), 12 L. J. Ch. 503; 6 Beav. 376.

(n) *Brandao v. Barnett* (1846), 12 C. & F. 787; 69 R. R. 204, H. L.

(o) *Frith v. Forbes* (1862), 32 L. J. Ch. 10; 4 De G. F. & J. 409; *Colvin v. Hartwell* (1837), 5 Cl. & F. 484, H. L. Comp. *König v. Brandt* (1901), 84 L. T. 748, C. A.

(p) *Buchanan v. Findlay* (1829), 9 B. & C. 738; *Seligmann v. Huth* (1877), 37 L. T. 488, C. A.; *Hill v. Smith* (1844), 12 M. & W. 618; 13 L. J. Ex. 243; *Ex p. Gomez, re Yglesias* (1875), L. R. 10 Ch. 639.

16. A factor, who acted as such for the owners of a ship, asked the master to let him have the certificate of registry for the purpose of paying certain duties at the custom house. Held, that his general lien as factor did not attach to the certificate (*q*).

17. A deed, dealing with two distinct properties, was deposited at a bank, with a memorandum pledging one of the properties to secure a specific sum and also the general balance due to the banker. Held, that the banker had no lien upon the other property, the deed having been deposited with a specific intention inconsistent therewith (*r*). So, a banker has no lien upon muniments of title casually left at the bank after a refusal by him to advance money upon their security (*s*).

Solicitor's General Lien.

Every solicitor has a lien for his general bill of costs upon documents and chattels belonging to his client (*t*) of which he lawfully obtains possession; and the Court will not interfere with his general lien by ordering him to deliver up papers deposited with him for the purposes of a particular suit, upon payment only of the costs of that suit, even though the possession of the papers be necessary to enable the client to go on with the proceedings (*u*). But, where the client has a pressing necessity for the possession of papers, the Court may order delivery, upon a deposit being made in Court sufficient to cover the amount of the solicitor's general bill of costs remaining unpaid and the costs of taxation (*x*).

The lien is confined to taxable costs, charges and expenses, and does not extend to advances or other claims arising otherwise than in the capacity of solicitor (*y*). Nor does the lien of a solicitor upon deeds handed to and retained by him personally extend to the general bill of costs of his firm (*z*).

Where possession of documents or chattels has been obtained by the solicitor without the authority of his client, the lien does not attach (*a*).

Documents coming into the possession of the solicitor as mortgagee of his client's estate (*b*) or as steward (*c*) or as town clerk (*d*) are not subject to the general lien; nor are documents deposited with him merely for safe custody (*e*),

(*q*) *Burn v. Brown* (1817), 2 Stark. 272.

(*r*) *Wylde v. Radford* (1864), 33 L. J. Ch. 51.

(*s*) *Lucas v. Dorrien* (1817), 7 Taunt. 278.

(*t*) The lien does not attach to the client's will: *Georges v. Georges* (1811), 18 Ves. 294; *Balch v. Symes* (1823), T. & R. 87; but see *Heap v. Jackson* (1887), W. N. 192, as to a charging order on the estate. Lien cannot be claimed upon a deed sought to be impeached: *Balch v. Symes*, *supra*.

(*u*) *Stevenson v. Blakelock* (1813), 1 M. & S. 535; *Worrall v. Johnson* (1820), 2 J. & W. 214; *Friswell v. King* (1846), 15 Sim. 191; *Re Broomhead* (1847), 5 D. & L. 52; 16 L. J. Q. B. 355.

(*z*) *Clutton v. Pardon* (1823), T. & R. 301; *Richards v. Platel* (1841), Cr. & Ph. 79; *Re Bevan and Whitting* (1864), 33 Beav. 439; *Re Jewitt* (1864), 34 Beav. 22; *Re Gulland* (1885), 31 C. D. 296.

(*y*) *Re Gulland*, *supra*; *Re Taylor*, [1891] 1 Ch. 590; 60 L. J. Ch. 525; *Re Walker* (1893), 68 L. T. 517; *Re Hanbury* (1897), 75 L. T. 449.

(*a*) *Re Forshaw* (1847), 17 L. J. Ch. 61; *Re Gough* (1894), 70 L. T. 725.

(*b*) *Wickens v. Townshend* (1830), 1 Russ. & M. 361; *Gibson v. May* (1853), 1 De G. M. & G. 512; *Leete v. Leete* (1879), 48 L. J. P. 61; *Cross v. Cross* (1881), 43 L. T. 553. See also Articles 75 and 76.

(*c*) *Pelly v. Wathen* (1849), 7 Hare, 351; *Sheffield v. Eden* (1878), 10 Ch. D. 291, C. A.

(*d*) *Champernown v. Scott* (1821), 6 Madd. 93.

(*e*) *R. v. Sankey* (1836), 5 A. & E. 423.

(*e*) *Re Long* (1881), 16 Ch. D. 617.

or for a specific purpose inconsistent with the lien (f), unless they are allowed to remain in his custody after the special purpose has failed or come to an end (g). The general lien will attach, however, to documents deposited for a particular purpose, unless the lien is excluded by express agreement, or is clearly inconsistent with such purpose (h).

Solicitor's Charging Lien.

Any Court in which a solicitor has been employed to prosecute or defend any suit, matter or proceeding, may at any time declare the solicitor entitled to a charge on the property recovered or preserved (i) through his instrumentality for his taxed costs in reference to that suit, matter or proceeding, and may make such orders for the taxation of the said costs and for raising money to pay, and for paying, the said costs out of the said property as they think fit; and all conveyances and acts done to defeat, or operating to defeat, that charge shall, except in the case of a conveyance to a *bonâ fide* purchaser for value without notice (k), be void as against the solicitor; provided that no such order shall be made if the right to recover the costs is barred by any Statute of Limitations (l). The right to such a declaration is often referred to as a "charging lien." It will pass to the assignee or legal personal representative of the solicitor (m). The order is a matter of judicial discretion (n), and must be made in the Court to which the particular suit is attached (o). The Act applies only to costs and expenses connected with proceedings in a Court of justice (p), not, *e.g.*, to the costs of an arbitration (q). All property recovered or preserved (r) in any such proceedings by the instrumentality of a solicitor is subject to his charging lien for the cost of such proceedings, even if the verdict and judgment therein be against his client (s). Thus, it attaches upon money received by way of compromise (s), or awarded

(f) *Re Cullen* (1859), 27 Beav. 51; *Re Clark* (1876), 4 Ch. D. 515.

(g) *Ex p. Sterling* (1809), 16 Ves. 257; *Ex p. Pemberton* (1810), 18 Ves. 282.

(h) *Ex p. Sterling*, *supra*; *Colmer v. Ede* (1870), 40 L. J. Ch. 185.

(i) As to the meaning of "property recovered or preserved," see *Rowlands v. Williams* (1885), 2 T. L. R. 72, C. A.; *Scholefield v. Lockwood* (1868), L. R. 7 Eq. 83; 38 L. J. Ch. 232; *Harrison v. Harrison* (1888), 13 P. D. 180; 58 L. J. P. 28, C. A.; *Re Pinkerton, Pinkerton v. Easton* (1873), L. R. 16 Eq. 490; 42 L. J. Ch. 878; *Foxon v. Gascoigne* (1874), L. R. 9 Ch. 654; 43 L. J. Ch. 729; *M'Larnon v. Carrickfergus U. C.*, [1904] 2 Ir. R. 44; *Re Clayton* (1905), 92 L. T. 223; *Re Turner, Wood v. Turner*, [1907] 2 Ch. 126, 539, C. A.; *Wingfield v. Wingfield*, [1919] 1 Ch. 462; 88 L. J. Ch. 229, C. A.

(k) See *The Birnam Wood*, [1907] P. 1; 76 L. J. P. 1, C. A.

(l) Solicitors Act, 1932 (22 & 23 Geo. 5, c. 27), s. 69. As to the Statute of Limitations, see *Ex p. Turner* (1861), 30 L. J. Ch. 29; *Baile v. Baile* (1871), L. R. 13 Eq. 497; 41 L. J. Ch. 300; *Smith v. Betty*, [1903] 2 K. B. 317; 72 L. J. K. B. 853, C. A.

(m) *Briscoe v. Briscoe*, [1892] 3 Ch. 543; 61 L. J. Ch. 665; *Baile v. Baile*, *supra*.

(n) *Harrison v. Harrison* (1888), 13 P. D. 180; 58 L. J. P. 28, C. A.; *Ex p. Harper, re Pooley* (1882), 20 Ch. D. 685; 51 L. J. Ch. 810; *Re Born, Curnock v. Born*, [1900] 2 Ch. 433; 69 L. J. Ch. 669; *Re Turner, Wood v. Turner*, [1907] 2 Ch. 126, 539; 76 L. J. Ch. 492, C. A.; *Re Cockrell's Estate*, [1912] 1 Ch. 23; 81 L. J. Ch. 152, C. A.

(o) *Re Fidley* (1871), L. R. 6 Ch. 865; *Callow v. Callow* (1877), 2 C. P. D. 362; *Higgs v. Schrader* (1878), 3 C. P. D. 252; 47 L. J. C. P. 426; *Owen v. Henshaw* (1877), 7 Ch. D. 385; 47 L. J. Ch. 267; *Clover v. Adams* (1881), 6 Q. B. D. 622; *Re Cook, ex p. Crippa*, [1899] 1 Q. B. 863; 68 L. J. Q. B. 597; *Re Deakin, ex p. Daniell*, [1900] 2 Q. B. 489; 69 L. J. Q. B. 725, C. A.

(p) *Re Humphreys, ex p. Lloyd-George*, [1898] 1 Q. B. 520; 67 L. J. Q. B. 412, C. A.

(q) *Macfarlane v. Lister* (1888), 37 Ch. D. 88; 57 L. J. Ch. 92, C. A.

(r) *Supra*, note (i).

(s) *Davies v. Lovendes* (1847), 3 C. B. 823; *Ross v. Buxton* (1889), 42 Ch. D. 190; 58 L. J. Ch. 442; *M'Larnon v. Carrickfergus U. C.*, [1904] 2 Ir. R. 44.

to the client upon a reference of the suit to arbitration (t). So, where, in a suit by a *cestui que trust* against his trustee, the plaintiff, after the appointment of a receiver, compromised with the defendant without consulting his solicitor, it was held that the solicitor was entitled to a first charge on the plaintiff's interest in the trust property (u). And, where a defendant was ordered to pay money into Court to abide the event of an action, and after he had paid it in the parties collusively compromised the action, the plaintiff's solicitor was held entitled to a charging order on the amount so paid in (x). So, where an action was dismissed, with costs amounting to £298, which were duly paid, and upon an appeal by the plaintiff, the decision was reversed and the defendant ordered to repay the £298, together with the costs of the appeal, amounting to £165, it was held that the solicitors who acted for the plaintiff on the appeal were entitled, in addition to the £165, to a charge on the £298, for the extra costs of the appeal as between solicitor and client (y). Money paid into Court by a plaintiff, as security for the defendant's costs, is not, however, on a judgment for the plaintiff, deemed to be property preserved, within the meaning of the Act (z). The lien is confined to the costs of the proceedings for recovering or preserving the particular property, and does not extend to the costs of a separate action by the same client (a). The charge is in the nature of salvage, and may be made on the interests in the property recovered or preserved of all persons who benefit by the proceedings, though they were not parties thereto, and did not employ the solicitor (b).

Priority of charging lien.—A solicitor is entitled to a charging order, even if he were discharged before the trial, but subject to the lien for costs of the solicitor for the time being (c). Such a charge has priority to a garnishee order in reference to the fund recovered (d), and to the claims of all purchasers for value and others who acquire their interests with a knowledge of the proceedings (e), and is paramount to a restraint on anticipation attached to

(t) *Ormerod v. Tate* (1801), 1 East, 464.

(u) *Trynam v. Porter* (1870), L. R. 11 Eq. 181; 40 L. J. Ch. 30. And see *Re Wright's Trusts*, [1901] 1 Ch. 317; 70 L. J. Ch. 119, C. A.

(x) *Moxon v. Sheppard* (1890), 24 Q. B. D. 627; 59 L. J. Q. B. 286.

(y) *Guy v. Churchill* (1887), 35 Ch. D. 489; 56 L. J. Ch. 670, C. A.

(z) *Re Wadsworth, Rhodes v. Sugden* (1885), 29 Ch. D. 517; 54 L. J. Ch. 638; *Pierson v. Knutsford Estates Co.* (1884), 13 Q. B. D. 666; 53 L. J. Q. B. 181, C. A.

(a) *Mackenzie v. Mackintosh* (1891), 64 L. T. 706, C. A.; *Smith v. Betty*, [1903] 2 K. B. 317; 72 L. J. K. B. 853, C. A.

(b) *Greer v. Young* (1882), 24 Ch. D. 545; 52 L. J. Ch. 915, C. A.; *Scholey v. Peck*, [1893] 1 Ch. 709; 62 L. J. Ch. 658; *Bulley v. Bulley* (1878), 8 Ch. D. 479; 47 L. J. Ch. 841, C. A.; *Charlton v. Charlton* (1883), 52 L. J. Ch. 971; *Emden v. Carter* (1881), 19 Ch. D. 311; 51 L. J. Ch. 371; *Ex p. Tweed*, [1899] 2 Q. B. 167; 68 L. J. Q. B. 794, C. A.; *Re Horne, Horne v. Horne*, [1906] 1 Ch. 271; 75 L. J. Ch. 206. *Berrie v. Howitt* (1869), L. R. 9 Eq. 1, must be considered overruled.

(c) *Re Wadsworth, supra*; *Re Knight, Knight v. Gardner*, [1892] 2 Ch. 368; 61 L. J. Ch. 399; *Pilcher v. Arden* (1877), 7 Ch. D. 318; 47 L. J. Ch. 479, C. A.

(d) *Ex p. Adams, Dallow v. Garrold* (1884), 14 Q. B. D. 543; 54 L. J. Q. B. 76, C. A.; *Shippey v. Gray* (1880), 49 L. J. C. P. 524, C. A. And see *The Heinrich* (1872), L. R. 3 Ad. 505; 41 L. J. Ad. 68.

(e) *Faithfull v. Ewen* (1878), 7 Ch. D. 495; 47 L. J. Ch. 457, C. A.; *Cole v. Eley*, [1894] 2 Q. B. 350; 63 L. J. Q. B. 682, C. A.; *Haymes v. Cooper* (1864), 33 L. J. Ch. 488; *The Paris*, [1896] P. 77; 65 L. J. P. 42; *Ridd v. Thorne*, [1902] 2 Ch. 344; 71 L. J. Ch. 624; *M'Larnon v. Carrickfergus U. C.*, [1904] 2 Ir. R. 44. Comp. *The Birnam Wood*, [1907] P. 1; 76 L. J. P. 1, C. A.

the property recovered or preserved of a married woman (*f*). Where a receiver was appointed in an action for dissolution of partnership, it was held that the charging lien of the plaintiff's solicitor had priority to the claim of the creditors of the partnership (*g*).

Effect of Compromise, etc.—The charging lien of a solicitor will not be permitted by the Court to be prejudicially affected by a collusive compromise (*h*), or by an agreement between the parties (*i*). Thus, where two actions were pending between the same parties, and they agreed to refer both actions to arbitration, the result being that £100 was awarded to one of the parties, and £80 to the other, it was held that the £80 could not be set off against the £100 to the prejudice of a solicitor who claimed a lien for the costs of the action in respect of which the £100 was awarded to his client (*i*). Nor will the costs of the opponent in a separate action be permitted to be set off to the prejudice of the solicitor's lien (*k*). So, on an application to set off cross judgments in distinct actions, the Court has discretion to order that the set-off shall be subject to the lien for costs of the solicitor of the opposite party (*l*). If the defendant in an action pay money to the plaintiff, either by way of compromise, or in pursuance of an award, or otherwise, after receiving notice from the plaintiff's solicitor of his claim to a charging lien thereon, the defendant is personally liable to such solicitor for his taxed costs in the proceedings, to the extent that the amount so paid by him would have satisfied such costs (*m*). But the Court will not interfere with a compromise entered into in good faith and not with the intention of depriving the solicitor of his costs (*n*). Where a verdict for £25 was entered, and a rule *nisi* was obtained to set it aside, it was held that a settlement for £10, made to avoid the expenses of a new trial, the plaintiff being a pauper, was not impeachable by the plaintiff's solicitor on the ground of his lien (*o*). And the lien is subject to the equities between the parties, and only attaches on the general result of the cause. Thus, where there is a counterclaim, or costs are ordered to be paid by the plaintiff in the same cause, the lien attaches only on the balance actually recovered by the plaintiff, after setting off the amount recovered by the defendant on the counterclaim, or the costs so

(*f*) *Re Keane* (1871), L. R. 12 Eq. 115; 40 L. J. Ch. 617. See Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 30), s. 2, abolishing restraint on anticipation, except as provided, attached by any instrument executed after January 1, 1936.

(*g*) *Jackson v. Smith, Ex p. Digby*, 53 L. J. Ch. 972; *Re Suffield and Watts* (1888), 20 Q. B. D. 693, C. A.; *Newport v. Pougher*, [1937] Ch. 214; 106 L. J. Ch. 166, C. A.

(*h*) *Price v. Crouch* (1891), 60 L. J. Q. B. 767; *Re Margtelson and Jones*, [1897] 2 Ch. 314; 66 L. J. Ch. 619.

(*i*) *Cowell v. Betteley* (1834), 10 Bing. 432.

(*k*) *Blakey v. Latham* (1889), 41 Ch. D. 518; *Hassell v. Stanley*, [1896] 1 Ch. 607; 65 L. J. Ch. 484; *Bake v. French*, [1907] 1 Ch. 428; 76 L. J. Ch. 299. But see *Puddephatt v. Leith*, [1916] 2 Ch. 168; 85 L. J. Ch. 543.

(*l*) *Edwards v. Hope* (1885), 14 Q. B. D. 922; 54 L. J. Q. B. 379.

(*m*) *Ross v. Buxton* (1889), 42 Ch. D. 190; 58 L. J. Ch. 442; *Ormerod v. Tate* (1801), 1 East, 464; 6 R. R. 327; *Read v. Dupper* (1795), 6 T. R. 361. And see *The Leader* (1868), L. R. 2 Ad. 314.

(*n*) *The Hope* (1883), 8 P. D. 144; 52 L. J. P. 63, C. A.; *Clark v. Smith* (1844), 6 M. & G. 1051; *Jones v. Bonner* (1848), 2 Ex. 230; 76 R. R. 586; *Reynolds v. Reynolds* (1909), 26 T. L. R. 104, C. A.

(*o*) *Re Sullivan v. Pearson* (1868), 38 L. J. Q. B. 65; L. R. 4 Q. B. 153.

ordered to be paid by the plaintiff (p). So, if the defendant be entitled, as against the plaintiff, to be relieved from the verdict, the Court will not abstain from interfering and giving effect to the defendant's rights, merely because the plaintiff's solicitor has a lien on the subject-matter (g). And where a defendant against whom a judgment for damages was obtained had an unsatisfied judgment against the plaintiff in a former action, a set-off of the damages was allowed, notwithstanding that the plaintiff's solicitor had *ex parte* obtained a charging order for his costs (r).

Town agents.—A London agent is not entitled, as against the client, to a charging order under the Act, because he is not the solicitor employed by the client (s); but the country solicitor may apply for such an order, and the Court will then direct the costs of the London agent to be paid out of the fund in question to the extent of the country solicitor's interest therein (t). The London agent in no case has any higher right as against the client than the country solicitor (u).

Shipmaster's Lien.

Every shipmaster has a maritime lien on the ship and freight for his wages, and for disbursements or liabilities properly made or incurred by him on account of the ship (x), and has a possessory lien on the cargo for freight and general average contributions due from the owners thereof (y). The lien for disbursements and liabilities is confined to such disbursements and liabilities as are made or incurred by the master in the ordinary course of his duty as such (z).

Maritime liens do not depend upon possession, but remain attached to the ship, notwithstanding any changes in the ownership (a), and are effectual even against a purchaser for value without notice (b). Where the rights of third parties are affected, however, such a lien may be lost by negligence or delay (b). Maritime liens are enforced by an Admiralty action *in rem*, in which the Court arrests and takes possession of the ship, in order, by sale or otherwise, to realise the amount of the lien (c). They are payable

(p) *Westcott v. Bevan*, [1891] 1 Q. B. 774; 60 L. J. Q. B. 536; *Robert v. Buée* (1878), 8 Ch. D. 198; 47 L. J. Ch. 414; *Pringle v. Gloag* (1879), 10 Ch. D. 676; 48 L. J. Ch. 380; *Jenner v. Morris* (1863), 11 W. R. 943.

(g) *Symons (or Simons) v. Blake* (1835), 4 L. J. Ex. 259; 2 C. M. & R. 416.

(r) *Goodfellow v. Gray*, [1899] 2 Q. B. 498; 68 L. J. Q. B. 1032, C. A.; *Ward v. Haddrill*, [1904] 1 K. B. 399; 73 L. J. K. B. 277.

(s) *Macfarlane v. Lister* (1888), 37 Ch. D. 88; 57 L. J. Ch. 92, C. A.

(t) *Tardrew v. Howell* (1861), 31 L. J. Ch. 57; 3 Giff. 381.

(u) *Peatfield v. Barlow* (1869), L. R. 8 Eq. 61; 38 L. J. Ch. 310; *Cockayne v. Harrison* (1873), L. R. 15 Eq. 298; 42 L. J. Ch. 660.

(z) Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 167; *The Neptune* (1824), 1 Hag. Ad. 227.

(y) *The Galam* (1863), 33 L. J. Adm. 97, P. C.; *Kirchner v. Venus* (1858), 12 Moo. P. C. 361, P. C. And see Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 494 to 498.

(a) *The Castlegate*, [1893] A. C. 38; 62 L. J. P. C. 17, H. L.; *The Orienta*, [1895] P. 49; 64 L. J. P. 32, C. A.; *The Fairport* (1882), 8 P. D. 48; 52 L. J. Ad. 21. Comp. *The Ripon City*, [1897] P. 226; 66 L. J. P. 110.

(b) *The Charles Amelia* (1868), L. R. 2 Ad. 330; 38 L. J. Ad. 17.

(c) *Harmer v. Bell (The Bold Buccleugh)* (1850), 7 Moo. P. C. 267; 83 R. R. 43, P. C.; *The Europa* (1863), 32 L. J. Ad. 188; 2 Moo. P. C. (n.s.) 1.

(c) *The Cella* (1888), 13 P. D. 82; 57 L. J. Ad. 55, C. A.

in the inverse order of their attachment on the *res* (*d*). Thus, a bottomry bond has priority to a maritime lien for wages and disbursements earned and made in the previous voyage to that in which the bond was given; and *vice versa* (*d*). The master's maritime lien for wages or disbursements, whenever earned or made, has priority, as a general rule, to the claim of a purchaser or mortgagee (*e*), and all other claims, except for salvage and collision (*f*). Where, however, the master binds himself personally by a bottomry bond, or personally guarantees the payment of a mortgage debt, he cannot claim priority for his lien to the prejudice of the bondholder or mortgagee (*g*). So, where a master, who was also a part owner, ordered necessaries, it was held that the claim for the necessaries had priority to that of the master for his wages and disbursements (*h*); but the priority of a master's lien to the claim of a mortgagee is not affected by the circumstance that the master is also a part owner, unless he is one of the mortgagors (*i*).

Article 75.

· CONFINED TO RIGHTS OF PRINCIPAL, EXCEPT IN THE CASE OF MONEY OR NEGOTIABLE SECURITIES.

The possessory lien of an agent attaches only upon goods or chattels in respect of which the principal has, as against third persons, the right or power to create the lien, and except in the case of money or negotiable securities, and subject to any statutory provision to the contrary (*k*), is confined to the rights of the principal in the goods or chattels at the time when the lien attaches, and is subject to all rights and equities of third persons available against the principal at that time (*l*). The lien of an agent upon money or negotiable securities deposited with him by or in the name of the principal is not affected by the rights or equities of third persons, and is as effectual as if the principal were the absolute owner of such money or securities, provided that at the time when the lien of the agent attaches he has no notice of any defect in the title of the principal thereto (*m*).

(*d*) *The Hope* (1872), 28 L. T. 287; *The William Safford* (1860), Lush. 69.

(*e*) *The Ringdove* (1886), 11 P. D. 120; 55 L. J. P. 56; *The Mary Ann* (1865), L. R. 1 Ad. 8; *The Hope* (1872), 28 L. T. 287.

(*f*) *The Panthea* (1871), 25 L. T. 389; *The Elin* (1883), 8 P. D. 129; 52 L. J. Ad. 55, C. A.

(*g*) *The Salacia* (1863), 32 L. J. Ad. 41. Comp. *The Edward Oliver* (1867), L. R. 1 Ad. 379; 36 L. J. Ad. 13; *The Daring* (1868), L. R. 2 Ad. 260; 37 L. J. Ad. 29; *The Bangor Castle* (1896), 74 L. T. 768.

(*h*) *The Jenny Lind* (1872), L. R. 3 Ad. 529; 41 L. J. Ad. 63; *The Eva*, [1921] P. 454.

(*i*) *The Peronia* (1868), L. R. 2 Ad. 65; 37 L. J. Ad. 60.

(*k*) *E.g.*, Factors Act, 1889 (52 & 53 Vict. c. 45): see Article 7; Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 25.

(*l*) See Illustrations. And see *Att.-Gen. v. Trueman* (1843), 13 L. J. Ex. 70; 11 M. & W. 694; *Att.-Gen. v. Walmesley* (1843), 13 L. J. Ex. 66; 12 M. & W. 179; *Re Harrold, Wilde v. Walford* (1884), 53 L. J. Ch. 505, C. A.; *Manningford v. Toleman* (1845), 1 Coll. 670; *Re Union Cement Co.* (1872), 26 L. T. 240; *Peat v. Clayton*, [1906] 1 Ch. 659; 75 L. J. Ch. 344.

(*m*) Illustration 9. *Tindall v. Barnett* (1887), 3 T. L. R. 476

Illustrations.

1. No solicitor or other agent can have a lien on the share register or minute book of a joint stock company, because the directors have no power to create any lien that could interfere with the use of such register or book for the purposes of the company (*n*). So, no lien can attach upon such books of a company as, under the articles of association or the Companies Acts, ought to be kept at the registered office of the company (*o*). And where documents come into the hands of a solicitor pending the winding-up of a company, he cannot claim any lien thereon that would interfere with the winding-up (*n*). But the fact that a company has issued debentures as a floating security does not prevent an agent from acquiring a lien on the title deeds of the company, and such a lien has priority to the claims of the debenture holders (*p*).

2. The directors of a building society, which has no borrowing powers, overdraw the banking account of the society, and agree that certain deeds deposited at the bank shall be held as security for the general balance. The transaction is *ultra vires*, and the banker has no lien on the deeds for the overdraft (*q*).

3. A solicitor or other agent is employed by trustees. He has no lien on the trust funds for his expenses (*r*). So, a solicitor employed by a trustee in bankruptcy has no lien for costs on property of the bankrupt recovered by him as such solicitor (*s*).

4. Deeds are deposited with a solicitor by a tenant for life. The solicitor has no lien on the deeds as against the remainderman (*t*). The lien of a solicitor upon deeds and papers deposited with him by a client is confined to the rights of the client therein, and is subject to all rights and equities of third persons available against the client (*u*). So, a solicitor or other agent has no lien, as such, on the separate property of a partner for the obligations of the firm (*x*).

5. A mortgage is paid off, and the property is reconveyed to the mortgagor. The mortgagee's solicitor has no lien as against the mortgagor on the title

(*n*) *Re Capital Ins. Ass., ex p. Beall* (1883), 24 Ch. D. 408; 53 L. J. Ch. 71, C. A.; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96; 78 L. J. Ch. 132.

(*o*) *Re Anglo-Maltese Dock Co.* (1885), 54 L. J. Ch. 730.

(*p*) *Brunton v. Electric Engineering Corpn.*, [1892] 1 Ch. 434; 61 L. J. Ch. 256. See *Re Dee Estates*, [1911] 2 Ch. 85; 80 L. J. Ch. 461, C. A.

(*q*) *Cunliffe (or Brooks) v. Blackburn Building Society* (1884), 9 App. Cas. 857; 54 L. J. Ch. 376, H. L. He is, however, in equity, entitled to hold them as security for so much of the money advanced as he can show to have been actually applied in payment of the debts and liabilities of the society. *Ibid*.

(*r*) *Staniar v. Evans* (1887), 3 T. L. R. 215; *Worrall v. Harford* (1802), 8 Ves. 4; *Lightfoot v. Keane* (1836), 3 L. J. Ex. 257; 1 M. & W. 745; *Hall v. Laver* (1842), 1 Hare, 571; *Francis v. Francis* (1854), 5 De G. M. & G. 108.

(*s*) *Re Humphreys, ex p. Lloyd-George*, [1898] 1 Q. B. 520; 67 L. J. Q. B. 412, C. A. See also *Meguerditchian v. Lightbound*, [1917] 2 K. B. 298; 86 L. J. K. B. 889, C. A.

(*t*) *Turner v. Letts* (1855), 24 L. J. Ch. 638; 20 Beav. 185; 109 R. R. 97; *Ex p. Nesbitt* (1805), 2 Sch. & Lef. 279.

(*u*) *Hollis v. Claridge* (1813), 4 Taunt. 807; *Pratt v. Vizard* (1833), 5 B. & Ad. 808; *Pelly v. Wathen* (1851), 1 De G. M. & G. 16; *Ozenham v. Esdaile* (1828), 2 Y. & J. 493; *Furlong v. Howard* (1804), 2 Sch. & Lef. 115.

(*x*) *Turner v. Deane* (1849), 18 L. J. Ex. 343; 3 Ex. 836; *Watts v. Christie* (1849), 18 L. J. Ch. 173; 11 Beav. 546.

deeds for costs due from the mortgagee, except the cost of the reconveyance, even if such costs were incurred in respect of the mortgaged property, *e.g.*, the costs of an attempted sale by the mortgagee (*y*). So, where a mortgagor borrowed the title deeds from the mortgagee and sold the property, it was held that the solicitor of the mortgagor, to whom the deeds were handed for the purpose of completing the sale, had no lien thereon for costs due from the mortgagor in respect of other transactions (*z*).

6. A sells goods to B, and ships them to his order. Before the goods arrive, A and B agree to rescind the contract for sale. The wharfinger cannot, on the arrival of the goods at his wharf, claim a lien on them as against A, for a general balance due from B (*a*). So, a wharfinger has no lien on goods, as against a buyer, for charges becoming due from the seller after the wharfinger has had notice of the sale (*b*).

7. A, an owner of land, deposits the title deeds at a bank as security for his general balance, and subsequently contracts to sell the land to B, who has notice of the terms of the deposit. The banker has notice of the sale, but continues the account, and makes fresh advances to A, who pays in sums from time to time. B pays the purchase-money to A by instalments, without notice of such advances. A having paid into the bank sums exceeding in the aggregate the amount owing to the bank at the time of the contract of sale, the banker has no lien on the title deeds or charge on the land as against B, though on the general balance there was always a debt due to the bank (*c*).

8. Goods are consigned to a factor for sale, the principal having committed an act of bankruptcy. The factor, with notice of the act of bankruptcy, advances money to the principal. The factor has no lien on the goods for the advances, and having sold them and received the proceeds, must account for such proceeds to the trustee in bankruptcy, because the principal had no power after the act of bankruptcy to create any lien (*d*).

9. *Negotiable instruments*.—A banker borrowed a specific sum of money from a stockbroker, with whom he deposited, as security, negotiable instruments belonging to third persons. The banker dealt as a principal with the broker, having had many previous transactions with him, and there was nothing to lead the broker to believe that the securities were not the property of the banker. Held, that the broker's general lien for the balance due to him from the banker attached upon the securities, although the banker had been guilty of gross fraud (*e*). So, the general lien of a banker upon negotiable instruments deposited with him is not affected by the circumstance

(*y*) *Re Llewellyn*, [1891] 3 Ch. 145; 60 L. J. Ch. 732; *Wakfield v. Newbon* (1844), 6 Q. B. 276; 13 L. J. Q. B. 258.

(*z*) *Young v. English* (1843), 7 Beav. 10.

(*a*) *Richardson v. Goss* (1802), 3 B. & P. 119.

(*b*) *Barry v. Longmore* (1840), 12 A. & E. 639.

(*c*) *London and County Bank v. Ratcliffe* (1881), 6 App. Cas. 722; 51 L. J. Ch. 28, H. L.

(*d*) *Copland v. Stein* (1799), 8 T. R. 199. Otherwise, if the factor had made the advances without notice of the act of bankruptcy, and before the date of the receiving order. See Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 45.

(*e*) *Jones v. Peppercorne* (1858), Johns. 430; 28 L. J. Ch. 158.

that the customer who deposits them is acting as agent for a third person (*f*), nor by equities between the customer and third persons (*g*). But an agent has no lien upon a negotiable instrument, as against the true owner, for advances made after notice of a defect in the title of the principal (*h*). So, a banker has no lien on a fund in his hands, in respect of any claims arising after notice of an assignment of the fund to a third person (*i*), or after notice that the fund belongs to a third person (*k*).

Article 76.

LIEN OF SUB-AGENTS.

Except where otherwise expressly provided by statute (*l*), a sub-agent who is employed without the authority, express or implied, of the principal, has no lien on the goods or chattels of the principal, as against the principal (*m*).

Where a sub-agent is appointed by an agent with the authority, express or implied, of the principal, the sub-agent—

- (a) has the same right of lien, general or particular, against the principal, on the goods and chattels of the principal, in respect of claims arising in the course of the sub-agency, as he would have had against the agent if the agent had been the owner of the goods and chattels; and such right of lien is not liable to be defeated by any settlement between the principal and agent to which the sub-agent is not a party (*n*);
- (b) has the same right of general lien on the goods and chattels of the principal in respect of all claims, whether arising in the course of the sub-agency or not, as he would have had against the agent if the agent had been the owner of the goods and chattels; provided that, as against the principal, such right of lien is available only to the extent of the lien, if any, to which the agent would have been entitled if the goods and chattels had been in his possession (*n*); and
- (c) has the same right of lien, general or particular, on the goods and chattels of the principal, as he would have

(*f*) *Brandao v. Barnett* (1846), 12 C. & F. 787, H. L.; *Baker v. Nottingham Bank* (1891), 60 L. J. Q. B. 542; *Bank of New South Wales v. Goulburn Valley Butter Factory*, [1902] A. C. 543; 71 L. J. P. C. 112, P. C.

(*g*) *Misa v. Currie* (1876), 1 App. Cas. 554; 45 L. J. Ex. 852, H. L.; *Johnson v. Roberts* (1875), L. R. 10 Ch. 505; 44 L. J. Ch. 678.

(*h*) *Solomons v. Bank of England* (1810), 13 East, 135; *De la Chaumette v. Bank of England* (1829), 9 B. & C. 208. And see *Redfern v. Rosenthal* (1902), 86 L. T. 855, C. A.

(*i*) *Jeffreys v. Agra Bank* (1866), L. R. 2 Eq. 674; 35 L. J. Ch. 686.

(*k*) *Locke v. Prescott* (1863), 32 Beav. 261; *Ex p. Kingston, re Gross* (1871), L. R. 6 Ch. 632; 40 L. J. Bk. 91; *Cuthbert v. Roberts*, [1909] 2 Ch. 226; 78 L. J. Ch. 529, C. A.

(*l*) See Article 87; Sale of Goods Act, 1893, s. 25.

(*m*) Illustration 1.

(*n*) Illustrations 5 and 6. *Blackburn v. Kymer* (1814), 5 Taunt. 584; *Cahill v. Dawson* (1857), 26 L. J. C. P. 253; 3 C. B. (n.s.) 106; *Mildred v. Maspons* (1883), 8 App. Cas. 874; 53 L. J. Q. B. 33, H. L.

had against the agent if the agent had been the owner of the goods and chattels, provided that at the time when the lien attaches he believes on reasonable grounds that the agent is the owner of the goods and chattels and is acting in the matter on his own behalf (o).

Illustrations.

1. A factor delegates his authority to a sub-agent, without the assent of the principal. The sub-agent has no lien on the principal's goods, even for duties paid in respect of those goods (p).

2. An agent, on behalf, and with the authority, of his principal, employs an insurance broker to effect a policy, the broker having no notice, and being unaware, that he is dealing with an agent. The broker has a lien on the policy for the general balance due to him from the agent, and is entitled to apply the proceeds of the policy in payment of such balance, notwithstanding that he has, in the meantime, received notice of the principal's rights (q). By the Marine Insurance Act, 1906 (r), s. 53, where a marine policy is effected on behalf of the assured by a broker, unless otherwise agreed, the broker has, as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy; and where he has dealt with the person who employs him as a principal, he has also a lien on the policy in respect of any balance on any insurance account which may be due to him from such person, unless when the debt was incurred he had reason to believe that such person was only an agent. If, however, the broker part with possession of the policy, the lien is lost; and it does not revive by regaining possession with knowledge that the person who dealt with him was an agent (s).

3. A, a commission agent, employed B, a broker, to buy certain goods, B having no knowledge that A was acting as an agent. B bought and paid for the goods and retained the warrants therefor. A was in fact acting for C, and C paid A for the goods. B, on A's instructions, resold the goods, and applied the proceeds in reduction of a running account between himself and A. In an action by C against B for converting the goods, it was held that B was not liable, because at the time of the sale he had a lien on the goods for the balance due to him from A (t).

4. A employed B to collect general average contributions under an insurance policy. B, in the ordinary course of business, employed C, an insurance broker, to collect the contributions, C being unaware that B was acting as an agent. C collected the contributions, and B became bankrupt. Held, in an action by A against C for the contributions, as money had and

(o) Illustrations 2 to 4.

(p) *Solly v. Rathbone* (1814), 2 M. & S. 298.

(q) *Mann v. Forrester* (1814), 4 Camp. 60; *Maanes v. Henderson* (1801), 1 East, 335; *Westwood v. Bell* (1815), 4 Camp. 349.

(r) 6 Edw. 7, c. 41.

(s) *Near East Relief v. King*, [1930] 2 K. B. 40; 90 L. J. K. B. 522.

(t) *Taylor v. Kymer* (1832), 3 B. & Ad. 320.

received to his use, that C was entitled to set off the amount of a debt due to him from B (u).

5. An agent, on behalf of his principal, employs an insurance broker to effect a policy, the broker being aware that the agent is acting for a principal. The principal pays the agent the amount of the premiums due in respect of the policy. Notwithstanding such payment, the broker has a lien upon the policy for premiums in respect thereof paid by him, or for which he is liable (x). But he has no lien, as against the principal, for a general balance due from the agent in respect of other transactions (y).

6. As against the solicitor employing him, a London agent has a general lien upon all moneys recovered and documents deposited with him in the course of his employment (z), but as against the client, his general lien is limited to the amount due from the client to the country solicitor (a). As against both the country solicitor and the client, he has a lien upon money recovered and documents deposited with him in a particular suit, for the amount of his agency charges and disbursements in connection with that suit (b).

Article 77.

HOW LIEN EXTINGUISHED OR LOST.

The lien of an agent is extinguished or lost—

(a) by his entering into any agreement (c), or acting in any capacity (d), which is inconsistent with the continuance of the lien;

(b) by waiver, express or implied. A waiver is implied whenever the conduct of the agent is such as to indicate an intention to abandon the lien, or is inconsistent with the continuance thereof (e). In particular, a waiver may be implied from his taking other security for the claim secured by the lien (f), if the nature of the security, or the circumstances

(u) *Montagu v. Forwood*, [1893] 2 Q. B. 350, C. A. And see *New Zealand, etc., Land Co. v. Watson* (1881), 7 Q. B. D. 374; 50 L. J. Q. B. 433, C. A.

(x) *Fisher v. Smith* (1878), 4 App. Cas. 1; 48 L. J. Ex. 411, H. L.; *Marine Insurance Act 1906* (6 Edw. 7, c. 41), s. 53 (2).

(y) *Mildred v. Maspons* (1883), 8 App. Cas. 874; 53 L. J. Q. B. 33, H. L.; *Levy v. Barnard* (1818) 2 Moo. 34; *Man v. Shiffner* (1802), 2 East, 523; *Snook v. Davidson* (1809), 2 Camp. 218; *Maanas v. Henderson* (1801), 1 East, 335; *Ladbroke v. Lee* (1850), 4 De G. & S. 106; *Marine Insurance Act, 1906* (6 Edw. 7, c. 41), s. 53 (2); *Fairfield Shipbuilding Co. v. Gardner* (1911), 104 L. T. 288; *Near East Relief v. King*, [1930] 2 K. B. 40; 99 L. J. K. B. 522.

(z) *Lawrence v. Fletcher* (1874), 12 Ch. D. 858; *Bray v. Hine* (1818), 6 Price, 203; *Re Jones and Roberts*, [1905] 2 Ch. 219; 74 L. J. Ch. 458, C. A.

(a) *Re Johnson, ex p. Edwards* (1881), 8 Q. B. D. 262; 51 L. J. Q. B. 108, C. A.; *Moody v. Spencer* (1822), 2 D. & R. 6; *Waller v. Holmes* (1860), 1 Johns. & H. 239; 30 L. J. Ch. 24.

(b) *Dicas v. Stockley* (1836), 7 C. & P. 587; *Lawrence v. Fletcher*, *supra*.

(c) Illustration 1. *Forth v. Simpson* (1849), 13 Q. B. 680; 18 L. J. Q. B. 263; *How v. Kirchner* (1856), 11 Moo. P. C. 21.

(d) Illustrations 2 and 3.

(e) Illustrations 4 and 5.

(f) *Cowell v. Simpson* (1809), 16 Ves. 275; 10 R. R. 181.

in which it is taken, be inconsistent with the continuance of the lien (*g*), or be such as to indicate an intention to abandon it (*h*).

The possessory lien of an agent is extinguished by his voluntarily parting with the possession of the goods or chattels subject thereto (*i*), except where he is induced to do so by fraud (*k*), or the circumstances in which he parts with such possession are consistent with the continuance of the lien, and are such as to show that he intends to retain the lien (*l*); but it is not affected by the fact that possession has been obtained from him unlawfully or without his consent (*m*).

The lien of an agent is not affected by the fact that the claim secured thereby becomes barred by a Statute of Limitations (*n*), or that the principal becomes bankrupt or insolvent (*o*), or sells or otherwise deals with the goods or chattels subject to the lien (*p*), after the lien has attached.

Illustrations.

1. A shipmaster elects to allow the balance of his wages to remain in the hands of the managing owners at interest. He thereby surrenders his lien for such wages (*q*).

2. A solicitor acts for both mortgagor and mortgagee in carrying out a mortgage. The solicitor thereby loses his lien on the title deeds of the mortgaged property for costs due from the mortgagor, even if the costs were incurred prior to the mortgage, and the deeds are not permitted to be taken out of the solicitor's possession (*r*).

3. A solicitor prepares a marriage settlement, on the instructions of the intended husband, and retains it in his possession after the marriage. He has no lien on the settlement as against the trustees, the cost of preparing it being payable by the husband (*s*).

4. An agent causes goods upon which he has a lien to be taken in execution at his own suit. He thereby waives the lien, though the goods are sold to him under the execution, and are never removed from his premises (*t*).

(*g*) *Angus v. MacLuchlan* (1881), 23 Ch. D. 330; 52 L. J. Ch. 587; *Tamvaco v. Simpson* (1866), L. R. 1 C. P. 303; 35 L. J. C. P. 196, Ex. Ch.

(*h*) Illustration 6. *The Albion* (1872), 27 L. T. 723; *Grant v. Mills* (1813), 2 Ves. & B. 306; 13 R. R. 101.

(*i*) Illustration 7. *Kruger v. Wilcox* (1754), Ambl. 252; *Bligh v. Davies* (1860), 28 Beav. 211.

(*k*) *Wallace v. Woodgate* (1824), R. & M. 193.

(*l*) Illustration 8.

(*m*) *Dicas v. Stockley* (1836), 7 C. & P. 587; *Re Carter* (1886), 55 L. J. Ch. 230.

(*n*) *Spears v. Hartley* (1798), 3 Esp. 81; *Re Broomhead* (1847), 5 D. & L. 52; 16 L. J. Q. B. 355; *Curwen v. Milburn* (1889), 42 Ch. D. 424, C. A.

(*o*) Illustration 9. *Ogle v. Story* (1833), 4 B. & Ad. 735; *General Share Co. v. Chapman* (1877), 46 L. J. C. P. 79; *The Cella* (1888), 13 P. D. 82; 57 L. J. Ad. 55, C. A.; *Ex p. Underwood* (1845), 9 Jur. 632; *Ex p. Moule* (1821), 5 Madd. 462; *Ex p. Markby* (1864), 11 L. T. 250.

(*p*) Illustration 10.

(*q*) *The Rainbow* (1885), 5 Asp. M. C. 479.

(*r*) *Re Nicholson, ex p. Quinn* (1883), 53 L. J. Ch. 302; *Re Mason* (1878), 10 Ch. D. 729; 48 L. J. Ch. 193; *Re Snell* (1877), 6 Ch. D. 105; *Re Messenger* (1875), 3 Ch. D. 317, not followed.

(*s*) *Re Lawrence, Bowker v. Austin*, [1894] 1 Ch. 556; 63 L. J. Ch. 205.

(*t*) *Jacobs v. Latour* (1828), 5 Bing. 130.

5. Upon a demand being made against an agent by his principal for a chattel upon which the agent has a lien, the agent claims to retain the chattel on some other ground, without mentioning the lien. He thereby waives the lien (u).

6. A solicitor, having a lien for costs, takes a security for the costs, and does not tell the client that he intends to reserve the lien. He is deemed to waive the lien, it being the duty of a solicitor, if he intend to reserve his lien in such a case, to explain to the client that such is his intention (x).

7. An agent delivers goods, on which he has a lien, on board a ship, to be conveyed on account and at the risk of the principal. The agent thereby surrenders his lien on the goods, and he has no power to revive it by stopping the goods *in transitu* (y).

8. A, a solicitor, on the instructions of a mortgagor, prepares and engrosses a reconveyance, which he sends to the solicitor of the mortgagee with a request that he will hold it on A's account, he having a lien thereon. The mortgagee executes the reconveyance. A's lien is not, in the circumstances, prejudiced by his parting with the possession of the engrossment, nor by its being executed by the mortgagee as a deed (z). So, if an agent give up a chattel in order that the principal may sell it and account for the proceeds to the agent, he does not thereby lose his lien on the chattel (a).

9. Goods were consigned to a factor for sale, and after he had sold them the principal committed an act of bankruptcy. The factor subsequently received the price of the goods. Held, that he had a lien on the goods for the amount of a debt due to him from the principal, and that he was entitled, as against the trustee in bankruptcy, to retain the proceeds in payment of the debt (b). So, an order for the winding-up of a company does not affect the lien of a solicitor upon documents of the company, if the lien were acquired before the presentation of the winding-up petition (c).

10. The principal assigns to a third person goods in the possession of a factor. The assignment does not affect the factor's general lien on the goods (d). So, the lien of an agent upon a policy of insurance is effectual against a subsequent assignee of the policy who gives notice of the assignment to the insurer, though the agent has given no notice of his lien to the insurer (e).

- (u) *Weeks v. Goode* (1859), 6 C. B. (N.S.) 367; *Boardman v. Sill* (1808), 1 Camp. 410, n.
- (z) *Re Morris*, [1908] 1 K. B. 473; 77 L. J. K. B. 265, C. A.; *Re Taylor, ex p. Payne Collier*, [1891] 1 Ch. 590; 60 L. J. Ch. 525; *Bissell v. Bradford Tram Co.* (1893), 9 T. L. R. 337, C. A.; *Groom v. Chesswright*, [1895] 1 Ch. 730; *Re Douglas*, [1898] 1 Ch. 199; 67 L. J. Ch. 85. *Comp. Stevenson v. Blakelock* (1813), 1 M. & S. 535; 14 R. R. 525.
- (y) *Sweet v. Pym* (1800), 1 East, 4; *Hathesing v. Laing* (1873), L. R. 17 Eq. 92; 43 L. J. Ch. 233.
- (z) *Watson v. Lyon* (1855), 7 De G. M. & G. 288.
- (a) *North Western Bank v. Poynter*, [1895] A. C. 56; 64 L. J. P. C. 27, H. L.
- (b) *Robson v. Kemp* (1802), 4 Esp. 233.
- (c) *Re Capital Fire Ins. Ass., ex p. Beall* (1883), 24 Ch. D. 408; 53 L. J. Ch. 71, C. A.; *Re Rapid Road Transit Co.*, [1909] 1 Ch. 96; 78 L. J. Ch. 132.
- (d) *Godin v. London Ass. Co.* (1758), 1 W. Bl. 103.
- (e) *West of England Bank v. Batchelor* (1882), 51 L. J. Ch. 199.

Sect. 4.—*Other Miscellaneous Rights.*

Article 78.

RIGHTS IN RESPECT OF GOODS BOUGHT IN OWN NAME.

Where an agent, by contracting personally (*f*), renders himself personally liable for the price of goods bought on behalf of his principal, the property in the goods, as between the principal and agent, vests in the agent, and does not pass to the principal until he pays for the goods, or the agent intends that it shall pass (*g*), and the agent has the same rights with regard to the disposal of the goods (*g*), and with regard to stopping them *in transitu* (*h*) as he would have had if the relation between him and his principal had been that of seller and buyer.

Article 79.

RIGHT TO INTERPLEAD.

Where adverse claims are made upon an agent in respect of any money, goods, or chattels in his possession, and he claims no interest in the subject-matter of the dispute other than for costs or charges, he may claim relief by way of interpleader (*i*), even as against his own principal whose title he has acknowledged (*k*), provided that he had no notice of the adverse claim at the time of such acknowledgment (*l*). Where the agent claims a lien on property as against the owner, whoever he may be, the lien is not such an interest as deprives him of the right to interplead in respect of the ownership of the property (*m*); but where he claims a lien or any other interest in the property, or part thereof, other than for costs or charges, as against a particular claimant, he is not permitted to interplead (*n*).

(*f*) See Articles 116 to 121.

(*g*) *Jenkyns v. Brown* (1849), 14 Q. B. 496; 19 L. J. Q. B. 286; *Schuster v. M'Kellar* (1857), 26 L. J. Q. B. 231; 7 E. & B. 704; *Ex p. Banner, re Tappenbeck* (1876), 2 Ch. D. 278; 45 L. J. Bk. 73, C. A. Comp. *Hathesing v. Laing* (1873), L. R. 17 Eq. 92; 43 L. J. Ch. 233.

(*h*) *Imperial Bank v. London and St. Katharine's Docks* (1876), 5 Ch. D. 195; 46 L. J. Ch. 335; *Feise v. Wray* (1802), 3 East, 93; *The Tigress* (1863), Brown. & Lush. 38; *Falk v. Fletcher* (1865), 34 L. J. C. P. 146; 18 C. B. (n.s.) 403; *Hawkes v. Dunn* (1831), 1 Tyr. 413; *Snee v. Prescott* (1743), 1 Atk. 245.

(*i*) R. S. C., Ord. 57; *Blyth v. Whiffin* (1872), 27 L. T. 330.

(*k*) *Attenborough v. St. Katharine's Docks* (1878), 3 C. P. D. 450; 47 L. J. C. P. 763, C. A.; *Ex p. Mersey Docks and Harbour Board*, [1899] 1 Q. B. 546; 68 L. J. Q. B. 540, C. A.; Illustrations 1 to 6. It would seem that, so far as they are decisions to the contrary, *Crawshaw v. Thornton* (1836), 2 Myl. & C. 1; *Cooper v. De Tastet* (1829), Tamlyn. 177; and *Nickolson v. Knowles* (1820), 5 Madd. 47, are no longer law since the C. L. P. Act, 1860 (23 & 24 Vict. c. 126).

(*l*) *Ex p. Davies, re Sadler* (1881), 19 Ch. D. 86, C. A.

(*m*) *Attenborough v. St. Katharine's Docks*, *supra*; *Cotter v. Bank of England* (1833), 3 M. & S. 180.

(*n*) *Mitchell v. Hayne* (1824), 2 Sim. & S. 63; *Braddick v. Smith* (1832), 9 Bing. 84; *Mogre v. Usher* (1835), 7 Sim. 383.

Illustrations.

1. An agent has funds in his hands, upon which a third person claims to have been given a lien by the principal. The agent may interplead as against his principal and the third person (o).

2. A instructs a stockbroker to sell shares, and sends him the share certificate and blank transfers. The shares are claimed by B, who alleges that they were obtained from him by fraud. A sues the broker, claiming the return of the certificate and transfers. The broker may interplead (p).

3. A, a part-owner of a vessel, instructs B, a broker, to insure the vessel. B receives an amount due under the policy in respect of a loss, and the whole of the amount is claimed by A. A sues B for the whole amount, and certain other part-owners sue him for part thereof. B may interplead (q).

4. A deposits goods with B, a wharfinger, and afterwards requests him to transfer them to the name of C, reserving to himself a right to draw samples. B enters the goods in C's name. D then claims them as paramount owner, and A acquiesces in his claim. C also claims them. B may interplead as against C and D (r).

5. A intrusted a policy to B for a specified purpose. C, who had pledged the policy with A, and A each brought an action against B for the policy. Held, that B was entitled to interplead (s).

6. A, an auctioneer, sells goods on behalf of B, and whilst a portion of the proceeds is still in his hands receives notice of a claim by C. B sues A for the balance of the proceeds. A may deduct his expenses and charges and interplead as to the residue (t).

Article 80.

RIGHT TO AN ACCOUNT.

Where the accounts between a principal and agent are of so complicated a nature that they cannot be satisfactorily dealt with in an action at law, the agent has a right to have an account taken in equity (u); but the relation of principal and agent is not alone sufficient to entitle an agent to an account in equity, when the matter can be dealt with in an action at law (x).

(o) *Smith v. Hammond* (1833), 6 Sim. 10.

(p) *Robinson v. Jenkins* (1890), 6 T. L. R. 69, 158, C. A.

(q) *Suart v. Welch* (1838), 4 Myl. & C. 305.

(r) *Mason v. Hamilton* (1831), 5 Sim. 19; *Pearson v. Cardon* (1831), 2 Russ. & M. 606; *Ex p. Mersey Docks and Harbour Board*, [1899] 1 Q. B. 546; 68 L. J. Q. B. 540. C. A.

(s) *Tanner v. European Bank* (1865), L. R. 1 Ex. 261; 35 L. J. Ex. 151.

(t) *Beal v. Hayes* (1862), 32 L. J. Ex. 129; 3 F. & F. 113; *Martinius v. Helmuth* (1815), Coop. 245; *Wright v. Freeman* (1879), 48 L. J. C. P. 276.

(u) *Padwick v. Hurst* (1854), 23 L. J. Ch. 657; 18 Beav. 575; *Blyth v. Whiffin* (1872), 27 L. T. 330; *Harrington v. Churchward* (1860), 29 L. J. Ch. 521; *Smith v. Leveauz* (1863), 33 L. J. Ch. 167; 1 H. & M. 123; *Waters v. Shaftesbury* (1860), 14 L. T. 184; *Shepherd v. Brown* (1862), 7 L. T. 499.

(x) *Padwick v. Stanley* (1852), 9 Hare, 627; *Dinwiddie v. Bailey* (1801), 6 Ves. 136. This is because the right of the principal may be founded on the fiduciary character of the agency.

Article 81.**NO RIGHT TO SUE PRINCIPAL ON CONTRACTS ENTERED INTO
ON HIS BEHALF.**

Except in the case of insurance brokers, who may sue their principals for premiums due under policies effected by them even if they have not paid or settled with the underwriters (y), no agent has any right of action against his principal on any contract entered into on the principal's behalf, whether the agent is himself personally liable on the contract to the other contracting party or not (z).

Illustrations.

1. A, a foreign merchant, employs B to buy goods on commission. B buys the goods, and the vendors invoice them to him and take his acceptance for the price. B cannot sue A, as for goods sold and delivered (a). (His only remedy is an action for indemnity.)

2. A broker buys goods on behalf of an undisclosed principal. He cannot sue the principal for not accepting the goods, although, having contracted without naming the principal, he is, by a usage of trade, personally liable on the contract (b). Nor can he sue as for goods bargained and sold (c).

(y) *Power v. Butcher* (1829), 8 L. J. (O.S.) K. B. 217; 5 M. & R. 327.

(z) Illustrations 1 and 2.

(a) *Seymour v. Pychlau* (1817), 1 B. & A. 14.

(d) *Telley v. Shand* (1872), 25 L. T. 658.

(c) *White v. Benckendorff* (1873), 29 L. T. 475; *Ex p. Dyster* (1816), 2 Rose, 349.

CHAPTER XI.

RELATIONS BETWEEN THE PRINCIPAL AND THIRD PERSONS.

Sect. 1.—*What Acts of Agents Bind their Principals.*

Article 82.

ACTS WITHIN ACTUAL OR APPARENT SCOPE OF AUTHORITY.

EVERY act done by an agent professedly on the principal's behalf, and within the scope of his actual authority, is binding on the principal with respect to persons dealing with the agent in good faith, even if the act be done fraudulently in furtherance of the agent's own interests, and not in the interests of the principal (a).

Every act done by an agent in the course of his employment on behalf of the principal, and within the apparent scope of his authority, binds the principal, unless the agent is in fact unauthorised to do the particular act, and the person dealing with him has notice (b) that in doing such act he is exceeding his authority (c).

Illustrations.

1. A is authorised in writing to act as the agent of B for the purpose of underwriting policies of insurance, and carrying on the ordinary business of underwriting, at Lloyd's, in the name and on behalf of B, in accordance with the usual custom of Lloyd's. A, in his own interests, and in abuse of his authority, underwrites a guarantee policy in B's name, the assured acting in good faith, but having no knowledge of the existence of the written authority or of its terms. It is in the ordinary course of business at Lloyd's to underwrite such policies, and A was therefore acting within the scope of his actual authority, though in fraud of B. B is bound by the policy (d).

2. A gave B a power of attorney authorising him to draw cheques on A's banking account and apply the money for A's purposes. B fraudulently drew cheques on A's account, signing the cheques "A by B his attorney," and paid the cheques into his own banking account to meet an overdraft. B's bankers applied the cheques in reduction of the overdraft without making

(a) Illustration 1.

(b) See Article 89.

(c) *Heyworth v. Knight* (1864), 33 L. J. C. P. 298; 17 C. B. (n.s.) 298; *Dyas v. Cruise* (1845), 2 J. & L. 460, Ir.; *Ex p. Dixon, re Henley* (1876), 4 Ch. D. 133; 46 L. J. Bk. 20; *Waller v. Drakeford* (1853), 22 L. J. Q. B. 274; 1 El. & Bl. 749; *Nickson v. Brohan* (1718), 10 Mod. 109; *Strauss v. Francis* (1866), L. R. 1 Q. B. 379; 35 L. J. Q. B. 133; *Curlewis v. Birkbeck* (1863), 3 F. & F. 894; *Wright v. Bigg* (1852), 15 Beav. 592; 92 R. R. 568. And see Illustrations. See also, as to implied authority, pp. 51 *et seq.*, *ante*.

(d) *Hambro v. Burnand*, [1904] 2 K. B. 10; 73 L. J. K. B. 669, C. A.

enquiries as to B's authority. Held, that B's bankers were bound by the terms of B's actual authority, which did not extend to paying B's debts with A's money (e); that they had converted the cheques; and as, from the form of the cheques, they had notice that the money was not B's money, they were negligent in not making enquiry as to B's authority and therefore could not avail themselves of the protection of the Bills of Exchange Act, 1882 (f), s. 82, and were liable to A for the amount of the cheques (g).

3. An agent was intrusted by his principal with a document containing a written consent signed by the principal to do a particular act, but the agent was told not to give the consent, except on certain conditions which were not specified in the document. The agent consented unconditionally. Held, that the principal was bound, though he had signed the document without having read it (h). So, where A gave B a power of attorney to charge and transfer in any form whatever any estate, etc., "following A's letters of instructions and private advices which, if necessary," should "be considered part of these presents," it was held that A was bound by a mortgage on his property executed by B, although as between A and B the mortgage was not authorised (i). So, where a principal wrote—"I have authorised A to see you, and, if possible, to come to some amicable arrangement"—and gave A private instructions not to settle for less than a certain amount, it was held that he was bound by A's settlement for less than that amount, the instructions not having been communicated to the other party (k). No private instructions given to an agent, of which the persons dealing with him have no notice, prevent the acts of the agent, within the scope of his ostensible authority, from binding the principal (l).

4. A gives B a signed form of promissory note or acceptance in blank, with authority on certain conditions to fill it up and convert it into a bill of exchange or promissory note for a certain amount. B fills it up in breach of the conditions and for a larger amount than was authorised, and negotiates it to C, who takes it in good faith and for value, without notice of the circumstances. A is liable to C on the bill or note as filled up (m). Otherwise, if C had had notice of the circumstances in which the document was issued (n), or if B had not been authorised to fill up or negotiate the instrument except on the receipt of instructions from A in that behalf (o).

(e) *Midland Bank v. Reckitt*, [1933] A. C. 1; 102 L. J. K. B. 207, H. L.; *Reckitt v. Barnett*, [1929] A. C. 176; 98 L. J. K. B. 136, H. L.

(f) 45 & 46 Vict. c. 61.

(g) *Midland Bank v. Reckitt*, *supra*; and see Article 89.

(h) *Beaufort v. Neeld* (1845), 12 C. & F. 248, H. L.

(i) *Davy v. Waller* (1899), 81 L. T. 107.

(k) *Trickett v. Tomlinson* (1863), 13 C. B. (n.s.) 663.

(l) *National Bolivian Navigation Co. v. Wilson* (1880), 5 App. Cas. 176, 209, H. L.; *Smith v. M'Guire* (1858), 3 H. & N. 554; 27 L. J. Ex. 465; 117 R. R. 853; *Whitehead v. Tuckett* (1812), 15 East, 400; 13 R. R. 509; *Fuentes v. Montis* (1868), L. R. 3 C. P. 268, 277.

(m) *Lloyd's Bank v. Cooke*, [1907] 1 K. B. 794; 76 L. J. K. B. 666, C. A.; *Montague v. Perkins* (1853), 22 L. J. C. P. 187; 45 & 46 Vict. c. 61, s. 20. Comp. *Bazendale v. Bennett* (1878), 3 Q. B. D. 525; 47 L. J. Q. B. 624, C. A.; *Watkin v. Lamb* (1901), 85 L. T. 483.

(n) *Hatch v. Searles* (1854); 24 L. J. Ch. 22.

(o) *Smith v. Prosser*, [1907] 2 K. B. 735; 77 L. J. K. B. 71, C. A.

5. A resident agent and manager of an unincorporated mining company orders goods which are necessary for working the mine. The shareholders are liable for the price, though the regulations of the company provide that all goods shall be purchased for cash, and no debt shall be incurred; unless the person supplying the goods had notice that the agent was exceeding his authority (*p*).

6. An agent was employed as manager of a business, which he carried on apparently as principal. It was incidental to the ordinary course of the business to draw and accept bills of exchange, but it had been expressly agreed between the principal and agent that the agent should not draw or accept bills of exchange on the principal's behalf. The agent accepted a bill, in the name in which the business was carried on. Held, that the principal was liable on the bill (*q*). So, a horsedealer is bound by a warranty given by his agent for the sale of a horse (*r*), and a client by a compromise entered into by his solicitor (*s*), even if the warranty or compromise were contrary to express instructions, with respect to persons having no notice of such instructions.

7. An agent was given authority, in cases of emergency, to borrow money on exceptional terms outside the ordinary course of business. A third person, in good faith and without notice that the agent was exceeding his authority, lent money to him on such exceptional terms. Held, that the principal was bound, although in the particular case the emergency had not arisen (*t*).

8. An auctioneer is instructed to sell goods by auction, a reserve price being fixed. By mistake he sells without reserve. The principal is bound by the sale, subject to the provisions of the Sale of Goods Act, 1893 (*u*), s. 4 (*z*), unless the conditions of sale expressly provide that the lot is offered subject to a reserve price (*y*). Similarly, in the case of a sale of real property (*z*).

9. A solicitor is authorised to sue for a debt. A tender of the debt to his managing clerk operates as a tender to the client, although the clerk was instructed not to receive payment of the particular debt, unless at the time of the tender he disclaims any authority to receive the money (*a*).

10. A claims £50 from B for the use and occupation of certain premises, and authorises B to pay the amount to C. B calls on C and expresses his readiness to pay the amount, but C refuses to accept it, and claims a larger sum. There is a concluded agreement between A and B to settle the claim for £50, and A cannot maintain an action for a larger sum (*b*).

(*p*) *Hawken v. Bourne* (1841), 8 M. & W. 703; p. 55, *ante*.

(*q*) *Edmunds v. Bushell* (1865), L. R. 1 Q. B. 97; 35 L. J. Q. B. 20.

(*r*) *Howard v. Sheward* (1866), L. R. 2 C. P. 148; 36 L. J. C. P. 42.

(*s*) *Buller v. Knight* (1867), L. R. 2 Ex. 109; 36 L. J. Ex. 66; *Smith v. Troup* (1849), 7 C. B. 757; 18 L. J. C. P. 209; and see p. 63, *ante*.

(*t*) *Montaignac v. Shitta* (1890), 15 App. Cas. 357. See also *Bryant v. Quebec Bank*, [1893] A. C. 170; 62 L. J. P. C. 73, P. C. (u) 56 & 57 Vict. c. 71.

(*z*) *Rainbow v. Hawkins*, [1904] 2 K. B. 322; 73 L. J. K. B. 641.

(*y*) *McManus v. Fortescue*, [1907] 2 K. B. 1; 76 L. J. K. B. 393, C. A.

(*a*) *Fay v. Miller*, [1941] Ch. 360, C. A.

(*b*) *Moffatt v. Parsons* (1814), 1 Marsh. 55; *Bingham v. Allport* (1833), 2 L. J. K. B. 86; 1 N. & M. 398; *Kirton v. Braithwaite* (1836), 1 M. & W. 310; *Wilmot v. Smith* (1828), 3 C. & P. 453; *Goodland v. Blewitt* (1808), 1 Camp. 477; *Finch v. Boning* (1879), 4 C. P. D. 143; *Watson v. Hetherington* (1843), 1 C. & K. 36.

(*b*) *Gretton v. Mees* (1878), 7 Ch. D. 839; *Field v. Boland* (1837), 1 Dr. & Wal. 37.

11. The manager of a business, which he carried on in his own name as apparent principal, ordered goods for the business. Held, that the undisclosed principal was liable for the price of the goods, although in ordering them the manager had exceeded his actual authority (c).

12. A broker was permitted by his principal, on several occasions, to draw bills in his own name for the price of goods sold on the principal's behalf. A purchaser accepted a bill so drawn, having previously paid in a similar manner for goods supplied to him. Held, that the principal was bound by the payment, although the broker became bankrupt before the maturity of the bill (d).

13. A, an iron-dealer, on one occasion sent B, a waterman, to buy iron on credit from C, and in due course paid C for it. On a subsequent occasion he sent him with ready money, but B again bought on credit and misappropriated the money. Held, that A was liable to C for the price of the iron bought on the second occasion, B apparently having authority to pledge his credit (e).

14. The assignee of a life policy which was voidable if the assured went beyond Europe, in paying the premiums to the local agent of the assurance company, told him that the assured was in Canada. The agent said that that would not avoid the policy, and continued to receive the premiums until the death of the assured. Held, that the company was estopped by the representation of its agent from saying that the policy was avoided by the absence of the assured (f). So, where a shipmaster signed a bill of lading containing a statement that the freight had been paid, it was held that the owners were estopped from claiming the freight from an indorsee for value of the bill of lading (g).

15. The directors of a company, having power to borrow such sums of money on the company's behalf as are authorised by resolution in general meeting, borrow £1,000 upon a bond under the seal of the company without the requisite resolution having been passed. The company is liable on the bond, unless the lender had notice of the irregularity (h). Persons dealing with a limited company are deemed to have notice of the contents of its memorandum and articles of association (h); but where an act is done by directors within the scope of their powers, third persons are entitled to assume that all the necessary formalities and conditions have been duly

(c) *Watteau v. Fenwick*, [1893] 1 Q. B. 346. But see *Kinahan v. Parry*, [1911] 1 K. B. 459; 80 L. J. K. B. 276, C. A.

(d) *Townsend v. Inglis* (1816), Holt, 278; 17 R. R. 636; *Meyer v. Sze Hai Tong Banking, etc., Co.*, [1913] A. C. 847; 83 L. J. P. C. 103.

(e) *Hazard v. Treadwell* (1730), 1 Str. 506. Comp. *Barrett v. Irvine*, [1907] 2 Ir. R. 462, C. A.

(f) *Wing v. Harvey* (1864), 23 L. J. Ch. 511; 5 D. G. M. & G. 265. See also *Mackie v. European Ass. Society* (1869), 21 L. T. 102; *Re Economic Fire Office* (1896), 12 T. L. R. 142; *London Freehold, etc., Co. v. Suffolk*, [1897] 2 Ch. 608; 66 L. J. Q. B. 790, C. A.; *Refuge Ass. Co. v. Kettlewell*, [1909] A. C. 243; 78 L. J. K. B. 519, H. L. Comp. *Re Hooley Hill Rubber, etc., Co.*, [1920] 1 K. B. 257; 89 L. J. K. B. 179, C. A.

(g) *Howard v. Tucker* (1831), 1 B. & Ad. 712. See also *Compania Naviera Vasconzada v. Churchill*, [1906] 1 K. B. 237; 75 L. J. K. B. 94.

(h) *Royal British Bank v. Turquand* (1856), 6 E. & B. 327; 25 L. J. Q. B. 317, Ex. Ch.; *Agar v. Athenæum Ass. Society* (1858), 27 L. J. C. P. 95; 3 C. B. (N.S.) 725.

complied with, unless they have notice of any irregularity (i). So, where the directors of a company had authority to delegate such of their powers as they thought fit to a managing director, it was held that the company was bound by the acts, within the scope of such powers, of a person who acted to their knowledge as managing director, though there was no other evidence that he had been duly appointed, or that the powers of the directors had been delegated to him, the person dealing with him having acted in good faith and without notice of any want of authority (k).

16. The directors of a company borrow money within the limits of their borrowing powers. The lender is under no obligation to inquire for what purposes the money is borrowed, and the company is bound by the contract of loan, though the money was borrowed and is applied for purposes which are *ultra vires*, unless the lender had notice of the improper nature of the transaction (l). If, by the articles of association, authority to borrow be restricted to the directors, the company can only be made liable for loans raised by the directors acting within their actual or apparent authority (m); but where the articles of a trading company empower the directors to borrow without restricting such power to the directors, the company may exercise its borrowing power through other duly authorised agents, and the acts of such agents, within the scope of their actual or apparent authority, will bind the company (n).

17. A, a solicitor, being intrusted with £4,000 to be lent on a mortgage, fraudulently retained £500, and told the mortgagor's solicitor that he was retaining it until a question as to the title was settled. A having become bankrupt, it was held that the mortgagor was entitled to redeem the property on payment of £3,500, with interest, though the mortgage deed acknowledged the receipt of £4,000, the retention of the £500 being within the apparent scope of A's authority (o).

18. A was in debt to a company for goods supplied by its branch at X, and also for goods supplied by its branch at Y. He entered into a deed of assignment for the benefit of his creditors. The company's agent at X branch assented to the deed, but its agent at Y branch refused to assent. The company sued A for the debt incurred at Y branch. Held, that the company was bound by the assent given by its agent at X branch as to all debts due from A, and was precluded from maintaining the action (p).

(i) *Gloucester Bank v. Rudry, etc., Colly. Co.*, [1895] 1 Ch. 629; 64 L. J. Ch. 451, C. A.; *Bargate v. Shortridge* (1855), 5 H. L. Cas. 297; 24 L. J. Ch. 457; *Re Land Credit Co.* (1869), L. R. 4 Ch. 460; 39 L. J. Ch. 27; *Duck v. Tower, etc., Co.*, [1901] 2 K. B. 314; 70 L. J. K. B. 625; *Montreal, etc., Co. v. Robert*, [1906] A. C. 196; 75 L. J. P. C. 33, P. C.; *Dey v. Pullinger, etc., Co.*, [1921] 1 K. B. 77; 89 L. J. K. B. 1229.

(k) *Biggerstaff v. Rowatt's Wharf*, [1896] 2 Ch. 93; 65 L. J. Ch. 536, C. A.; *British Thomson-Houston Co. v. Federated European Bank*, [1932] 2 K. B. 176; 101 L. J. K. B. 690, C. A.

(l) *Re Payne, Young v. Payne*, [1904] 2 Ch. 608; 73 L. J. Ch. 849, C. A.

(m) *Mahony v. East Holyford Mining Co.* (1875), L. R. 7 H. L. 869; *Re County Life Assurance Co.* (1870), L. R. 5 Ch. 288; 39 L. J. Ch. 471.

(n) *Mercantile Bank of India v. Chartered Bank of India*, [1937] 1 A. E. R. 231.

(o) *Boyd v. Craster* (1864), 10 L. T. 480.

(p) *Dunlop Rubber Co. v. Haigh*, [1937] 1 K. B. 347; 106 L. J. K. B. 166.

Article 83.

NOT BOUND BY ACTS BEYOND SCOPE OF AUTHORITY, OR NOT DONE IN COURSE OF EMPLOYMENT.

No principal is bound by any act of his agent which is not done in the course of the agent's employment on his behalf (*q*), or by any act which is not within the apparent scope of the agent's authority, unless the principal in fact authorised the agent to do the particular act (*r*).

This article is subject to the provisions of Articles 84 to 87.

Illustrations.

1. A agreed with a company to become surety for a debt owing by B, and indorsed a bill to the company for the amount, it being understood that he was to have funds to meet the bill out of a debt accruing due to B from C. The managing director of the company, who knew of this arrangement between A and B, had previously lent money privately to B, and held his acceptance. When the acceptance became due, the managing director obtained an order from B for the payment to him of the debt due from C, and appropriated this payment to his own private debt. In an action by the company against A on the bill indorsed by him as surety, it was held that the company was not responsible for the acts of the managing director in obtaining payment of his private debt, such acts not being done in the course of his employment on behalf of the company (*s*).

2. The secretary of a company, who has authority to give acknowledgments and certificates in respect of share certificates lodged with the company, fraudulently certifies that certain certificates have been lodged, when in fact, as he knows, the transfers were lodged without the certificates. The proposed transferee acts to his detriment on the faith of the certification. The company is not estopped from setting up the true facts, and showing that the proposed transferor had no shares to transfer (*t*). So, where the secretary of a company borrowed money for his own purposes on the security of a certificate, certifying that certain nominees of the lenders were registered as transferees of certain shares in the company, the certificate being in proper form and under seal, but the seal having been affixed fraudulently, and the signatures of the directors forged by the secretary, it was held that the

(*q*) Illustrations 1 and 2. And see *Tobin v. Crawford* (1842), 9 M. & W. 716; Ex. Ch., *Bank of Scotland v. Watson* (1813), 1 Dow. 40, H. L.; *Rhodes v. Moules*, [1895] 1 Ch. 236; 64 L. J. Ch. 122, C. A.

(*r*) Illustrations 3 to 16. *Olding v. Smith* (1852), 16 Jur. 497; *Graves v. Masters* (1883), 1 C. & E. 73; *Fitzgerald v. Dressler* (1859), 29 L. J. C. P. 113; 7 C. B. (N.S.) 374; *Altwood v. Munnings* (1827), 7 B. & C. 278; *Att.-Gen. v. Jackson* (1846), 5 Hare, 365; *Fenn v. Harrison* (1790), 3 T. R. 757; *Levy v. Richardson* (1889), 5 T. L. R. 236; *Kendal v. Wood* (1870), L. R. 6 Ex. 243; 39 L. J. Ex. 167, Ex. Ch.; *Brettel v. Williams* (1849), 4 Ex. 623; 19 L. J. Ex. 121; *Sickens v. Irving* (1859), 29 L. J. C. P. 25; 7 C. B. (N.S.) 165; *Byrne v. Londonderry Tramway Co.*, [1902] 2 Ir. R. 457, C. A. See also Article 40, Illustration 6; Article 100, Illustrations 12 to 17; Article 102.

(*s*) *McGowan v. Dyer* (1873), L. R. 8 Q. B. 141; *Watkin v. Lamb* (1901), 85 L. T. 483.

(*t*) *Whitechurch v. Cavanagh*, [1902] A. C. 117; 71 L. J. K. B. 400, H. L.; *Kleinwort v. Associated Automatic Machine Corpn.* (1934), 151 L. T. 1, H. L.

company was not estopped from disputing the title of the lenders to the shares, nor responsible to them in any way for the fraudulent acts of the secretary (u). A secretary authorised to deliver certificates of shares is not thereby held out as having authority to warrant their genuineness (u).

3. The manager and director of the business, in South America, of a company, gave a promissory note in the name of the company. It was not shown that it was necessary, or in the ordinary course of business of such a company, when carried on in the usual way, to give promissory notes. Held, that the company was not bound by the note (x).

4. The local agent of an insurance company contracted on behalf of the company to grant a policy. Held, that it was not within the ordinary scope of the authority of such an agent to make such a contract, and that, therefore, the company was not bound by the contract, unless it could be shown that the agent was, in fact, authorised to make it (y). So, an insurance company is not bound by the acceptance of a premium by its agent after the time for payment of the premium has expired (z). And where a house or estate agent who is employed to procure a purchaser at a certain price enters into a contract of sale, the principal is not bound unless he in fact authorised the agent to make the contract on his behalf, because it is not within the ordinary scope of such an agent's authority to enter into binding contracts on his principal's behalf (a).

5. A stockbroker who was authorised to sell stock, sold it on credit, in good faith, for the benefit of the principal. Held, that the principal, not having expressly authorised a sale on credit, was not bound by the contract, because it is not usual to sell stock on such terms (b).

6. The manager of a public-house, who had authority to deal with particular persons only, bought spirits from a person with whom he had no authority to deal. Held, that the principal was not bound, it being usual for such managers to be restricted to particular persons from whom to purchase spirits (c).

(u) *Ruben v. Great Fingall Consolidated*, [1906] A. C. 439; 75 L. J. K. B. 843, H. L.; *South London Greyhound Racecourses v. Wake*, [1931] 1 Ch. 496; 100 L. J. Ch. 169. *Shaw v. Port Philip Mining Co.* (1884), 13 Q. B. D. 103; 15 L. J. Q. B. 369, is probably not law. Comp. *Balkis Consolidated Co. v. Tomkinson*, [1893] A. C. 396; 63 L. J. Q. B. 134, H. L.; *Re Ottos Kopje Diamond Mines*, [1893] 1 Ch. 618; 62 L. J. Ch. 166; *Longman v. Bath Tramways*, [1905] 1 Ch. 646; 74 L. J. Ch. 424, C. A.; *Dizon v. Kennaway*, [1900] 1 Ch. 833; 69 L. J. Ch. 501.

(x) *Re Cunningham, Simpson's claim* (1887), 36 Ch. D. 532; 57 L. J. Ch. 169.

(y) *Linford v. Provincial, etc. Ins. Co.* (1864), 34 Beav. 291. See also *Comerford v. Britannic Assurance Co.* (1908), 24 T. L. R. 593. Comp. *Holdsworth v. Lances and Yorks. Ins. Co.* (1907), 23 T. L. R. 521; *Refuge Ass. Co. v. Kettlewell*, [1909] A. C. 243; 78 L. J. K. B. 519; *Murfit v. Royal Ins. Co.* (1922), 38 T. L. R. 334.

(z) *Accey v. Fernie* (1840), 7 M. & W. 151. See also *London and Lancs. Ass. Co. v. Fleming*, [1897] A. C. 499; 66 L. J. P. C. 116.

(a) *Chadburn v. Moore* (1892), 61 L. J. Ch. 674; *Hamer v. Sharp* (1874), L. R. 19 Eq. 108; 44 L. J. Ch. 53; *Prior v. Moore* (1887), 3 T. L. R. 624; *Thuman v. Best* (1907), 97 L. T. 239; *Lewcock v. Bromley* (1920), 37 T. L. R. 48. Comp. *Rosenbaum v. Belson*, [1900] 2 Ch. 267; 69 L. J. Ch. 569; *Keen v. Mear*, [1920] 2 Ch. 574; 89 L. J. Ch. 513; *Allen v. Whiteman* (1920), 89 L. J. Ch. 534.

(b) *Willshire v. Sims* (1808), 1 Camp. 258.

(c) *Daun v. Simmins* (1879), 41 L. T. 783, C. A. See also *Kinshan v. Parry*, [1911] 1 K. B. 459; 80 L. J. K. B. 276, C. A.; and compare *Watteau v. Fenwick*, [1893] 1 Q. B. 346.

7. A bank manager guarantees the payment of a certain draft. It is not within the ordinary scope of a bank manager's authority to give such a guarantee, and the bank therefore is not liable thereon unless he was expressly authorised to give it (*d*).

8. A gave authority to B, an insurance broker in Liverpool, to underwrite policies of marine insurance in his name, the risk not to exceed £100 by any one vessel. B underwrote a policy for £150 on A's behalf. The assured was not aware of the limitation on B's authority, but it was notorious in Liverpool that in nearly all such cases certain limits were fixed. Held, that A was not liable on the policy (*e*).

9. An insurance broker, being authorised to effect an insurance, agreed with a company for a policy on certain terms. The policy was duly executed by the company, and retained to await the application of the broker, who was debited with the amount of the premium. The broker, having been paid the premium by his principal, told the company that the insurance was a mistake, and fraudulently cancelled the policy without the principal's authority. Held, that the principal was entitled to enforce the contract as against the company, it not being part of a broker's ordinary authority to cancel contracts made by him (*f*).

10. A proposer for an insurance policy permitted an agent of the insurance company to invent the answers to questions which were intended to form the basis of the contract, and to send them to the company as answers of the proposer. Held, that in answering the questions the agent acted as the agent of the proposer and not of the company, and some of the answers being false, that the proposer could not claim under a policy granted by the company, though the proposer did not specifically authorise the agent to answer falsely, and did not know that he had done so (*g*).

11. A principal, who is in the habit of paying cash for goods bought by his agent, gives the agent money to buy goods. The agent buys the goods on credit and misappropriates the money. The principal is not liable for the price of the goods (*h*).

12. A partner, who is given authority to settle the affairs of the partnership on the winding-up thereof, draws a bill of exchange in the name of the firm. The other partners are not liable on the bill, unless they expressly authorised him to bind them by drawing bills (*i*).

13. The secretary of a company fraudulently, and without the knowledge of the directors, represented to A that if he took certain shares he would

(*d*) *Re Southport Banking Co.* (1885), 1 T. L. R. 204. See also *Banbury v. Bank of Montreal*, [1918] A. C. 626; 87 L. J. K. B. 1158, H. L.

(*e*) *Baines v. Ewing* (1880), L. R. 1 Ex. 320; 35 L. J. Ex. 194.

(*f*) *Xenos v. Wickham* (1866), L. R. 2 H. L. 286; 36 L. J. C. P. 113, H. L.

(*g*) *Biggar v. Rock Life Ass. Co.*, [1902] 1 K. B. 516; 71 L. J. K. B. 79; *Life and Health Ass. Assn. v. Yule* (1904), 6 F. 437; *M'Millan v. Accident Ass. Co.*, [1907] S. C. 484; *Connors v. London and Provincial Ass. Co.* (1913), 47 Ir. L. T. 148; *Newsholme v. Road Transport Co.*, [1929] 2 K. B. 356; 98 L. J. K. B. 751, C. A. Cf. *Keeling v. Pearl Ass. Co.* (1923), 129 L. T. 573.

(*h*) *Stubbing v. Heintz* (1791), 1 Peake, 66; *Rusby v. Scarlett* (1803), 5 Esp. 76; *Pearce v. Rogers* (1800), 3 Esp. 214.

(*i*) *Kilgour v. Finlayson* (1789), 1 H. Bl. 156; *Abel v. Sutton* (1800), 3 Esp. 108. *Comp. Smith v. Winter* (1838), 4 M. & W. 454; 8 L. J. Ex. 34.

be appointed solicitor to the company, and subsequently that he had been so appointed. A, on the faith of the representations, applied for the shares, which were allotted to him. Held, that A was bound by the contract to take the shares the representations being outside the scope of the secretary's employment. The duties of a secretary are *prima facie* clerical and ministerial only, and it is not within the ordinary course of his employment to induce persons to take shares, nor to make any bargains or conditions as to taking shares (k). So, where the secretary of a tramway company made a representation as to the financial relations of the company, and it was not shown that he was authorised to make the representation, it was held that the company was not bound, it not being part of the ordinary duties of such secretary to make any representations on behalf of the company (l). But a principal is not entitled to retain the benefit of a contract induced by unauthorised misrepresentations of his agent; and where premiums were paid on a policy on the faith of untrue statements by an agent of the insurance company, it was held that the company was liable to repay all the premiums paid after the making of the misrepresentations, though the agent had no authority to make them (m).

14. A company declared dividends which were not warranted by its financial condition. A law agent (who was also a member) of the company mentioned the dividends to A as proof of the flourishing condition of the company, and on the faith of his representations A purchased shares. Held, that A was bound by his contract to take the shares, it not being in the ordinary course of a law agent's employment to make representations as to the financial state of the company (n).

15. A steward, who was instructed to find a tenant for a vacant farm, but to consult with his principal before granting a lease, entered into an agreement to let the farm for twelve years, without consulting the principal. Held, that the principal was not bound by the agreement (o).

16. A principal cannot commit an act of bankruptcy by an unauthorised act of his agent, done without his knowledge (p).

Article 84.

DISPOSITIONS BY AGENTS INTRUSTED WITH APPARENT OWNERSHIP OR TITLE-DEEDS OF PROPERTY.

Where a principal, by words or conduct, represents, or permits it to be represented, that his agent is the owner of any property,

(k) *Newlands v. Employers' Accident Association* (1885), 54 L. J. Q. B. 428, C. A. As to representations by promoters, see *Lynde v. Anglo-Italian Hemp Co.*, [1896] 1 Ch. 178; 65 L. J. Ch. 96, C. A.

(l) *Barnett v. South London Tram Co.* (1887), 18 Q. B. D. 815; 56 L. J. Q. B. 452, C. A.; *New Brunswick Ry. v. Conybeare* (1862), 9 H. L. Cas. 711; 31 L. J. Ch. 297, H. L.; *Ex p. Frowd* (1861), 3 L. T. 843.

(m) *Refuge Ass. Co. v. Kettlewell*, [1909] A. C. 243; 78 L. J. K. B. 519, H. L.; *Hughes v. Liverpool, etc., Socy.*, [1916] 2 K. B. 482; 85 L. J. K. B. 1643, C. A.

(n) *Burnes v. Pennell* (1849), 2 H. L. Cas. 497.

(o) *Collen v. Gardner* (1856), 21 Beav. 540.

(p) *Re Sawers, ex p. Blain* (1879), 12 Ch. D. 522, C. A.

any sale, pledge, mortgage, or other disposition for value of the property by the agent is as valid against the principal as if the agent were the owner thereof, with respect to any person dealing with him on the faith of such representation (q).

Where a principal intrusts his agent with the possession of the title-deeds of any property, and authorises him to raise money on the security thereof, any security given by the agent on the property for money advanced, though for a larger amount than he was authorised to raise, is valid against the principal, provided that the person taking the security acts in good faith, and without notice that the agent has not authority to give the security (r).

Where a mortgagee of property permits the mortgagor to have possession of the title-deeds for the purpose of giving a security on the property, any security for value given by the mortgagor thereon has priority to the claim of the mortgagee, provided that the person taking the security acts in good faith, and without notice of the mortgage (s).

Provided always that no right or title can be acquired under or by means of any forged instrument (t).

Illustrations.

1. A, through the agency of B, a broker, obtained a loan on a mortgage of stock, and afterwards permitted the security to be transferred to B's banker, who had no notice of A's title and believed that B was the owner of the stock. B sold the stock, which was transferred by the banker to the purchaser, and, having paid off the loan, converted the balance to his own use. Held, that A had no remedy against the banker (u).

2. A broker, having effected an insurance policy in his own name, was permitted to retain possession thereof for the purpose of receiving the proceeds. The broker pledged the policy. Held, that the pledgee was entitled, as against the principal, to retain the advance out of the proceeds of the policy (x).

(q) Illustrations 1 and 2. And see cases cited in note (s), below. Comp. *Farquharson v. King*, [1902] A. C. 325; 71 L. J. K. B. 667, H. L.

(r) Illustration 3. See also *Gordon v. James* (1885), 30 Ch. D. 249, C. A.; *King v. Smith*, [1900] 2 Ch. 425; 69 L. J. Ch. 598; *London Freehold, etc., Co. v. Suffield*, [1897] 2 Ch. 608; 66 L. J. Ch. 790, C. A.; *Hooper v. Herts*, [1906] 1 Ch. 549; 75 L. J. Ch. 253, C. A.; *Powell v. Browne* (1908), 97 L. T. 854, C. A.

(s) *Perry-Herrick v. Atwood* (1857), 2 De G. & J. 21; *Briggs v. Jones* (1870), L. R. 10 Eq. 92; *Clarke v. Palmer* (1882), 21 Ch. D. 124; 51 L. J. Ch. 634. Comp. *Colyer v. Finch* (1850), 5 H. L. Cas. 905; 26 L. J. Ch. 65, H. L.; *Northern Counties Ins. Co. v. Whipp* (1884), 26 Ch. D. 482; 53 L. J. Ch. 629, C. A.; *Hunt v. Elmes* (1861), 30 L. J. Ch. 255; *Cotter v. Nat. Prov. Bank* (1904), 20 T. L. R. 607.

(t) Illustrations 4 and 5. *Eadaile v. La Nauze* (1835), 1 Y. & C. 394; 4 L. J. Ex. Eq. 46. Article 83, Illustration 2.

(u) *Marshall v. Nat. Prov. Bank* (1892), 61 L. J. Ch. 465; *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120; 62 L. J. Ch. 358. See also *Fuller v. Glyn*, [1914] 2 K. B. 168; 83 L. J. K. B. 764. Comp. *Jameson v. Union Bank of Scotland* (1913), 109 L. T. 850.

(x) *Callow v. Kelson* (1862), 10 W. R. 193.

3. An owner of certain deeds intrusts them to an agent, with authority to pledge them for a certain sum. The agent pledges them for a larger sum to a person who takes them in good faith, and without notice of the limit on the agent's authority. The owner is not entitled to recover the deeds, except on repayment of the full amount advanced upon them (y).

4. A solicitor is employed to obtain a loan of £100 on a mortgage of certain property, and is intrusted with the title-deeds for that purpose. He forges the client's signature to a mortgage deed for £400, and misappropriates the whole sum. The mortgage is void, and the client is not liable to the mortgagee, even to the extent of £100 (z).

5. A corporation negligently allows its secretary to have the custody of its common seal. The secretary affixes the seal to a forged power of attorney, under which stock belonging to the corporation is transferred. The corporation is not bound by the transfer (a).

Article 85.

DEALINGS WITH MONEY AND NEGOTIABLE SECURITIES.

Where an agent, in consideration of an antecedent debt or liability, or for any other valuable consideration, pays or negotiates money or negotiable securities in his possession to a person who receives the same in good faith and without notice that the agent has not authority so to pay or negotiate the same, the payment or negotiation is as valid as if it had been expressly authorised by the owner of the money or securities.

A thing is deemed to be done in good faith within the meaning of this article when it is in fact done honestly, whether it is done negligently or not (b).

Illustrations.

1. A, having bought on the Stock Exchange scrip which was issued in England by the agent of a foreign government, and which purported to entitle the bearer, on payment of £100, to receive a bond for that amount,

(y) *Brocklesby v. Temperance Building Society*, [1895] A. C. 173; 64 L. J. Ch. 433, H. L.; *Tottenham v. Green* (1863), 1 N. R. 466; *Robinson v. Montgomery Brewery*, [1896] 2 Ch. 841; *Rimmer v. Webster*, [1902] 2 Ch. 163; 71 L. J. Ch. 561; *Fry v. Smellie*, [1912] 3 K. B. 282; 81 L. J. K. B. 1003, C. A.; *Abigail v. Lapin*, [1934] A. C. 491; 103 L. J. P. C. 105, P. C.

(z) *Painter v. Abil* (1863), 33 L. J. Ex. 60; 2 H. & C. 113; *Fox v. Hawks* (1879), 13 Ch. D. 822; 49 L. J. Ch. 579.

(a) *Bank of Ireland v. Evans' Trustees* (1855), 5 H. L. Cas. 389; 101 R. R. 218; *Merchants of Staple v. Bank of England* (1888), 21 Q. B. D. 160; 57 L. J. Q. B. 418, C. A.; *Lewes Laundry Co. v. Barclay* (1906), 22 T. L. R. 737. And see Article 83, Illustration 2.

(b) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 90; *Goodman v. Harvey* (1836) 4 A. & E. 870; *Raphael v. Bank of England* (1855), 25 L. J. C. P. 33; 17 C. B. 161; *Jones v. Gordon* (1877), 2 App. Cas. 616, H. L. Illustration 2. As to notice, see Article 89.

intrusted the scrip to a broker. The broker pledged the scrip as security for a debt owing by himself, the pledgee taking it in good faith and without notice that the broker was not authorised so to pledge it. Held, that the scrip being negotiable in the same manner as the bond which it represented would be, the pledgee acquired a good title, as against A, to the extent of the pledge (c).

2. A broker fraudulently pledged with a banker negotiable securities belonging to various principals, as security for an advance. The banker acted in good faith, but had no knowledge whether the securities were the property of the broker, or whether he had authority to pledge them, or not, and made no inquiries. Held, that the banker had a good title to the securities, as against the principals, to the extent of the advance (d). Every person who takes negotiable securities for valuable consideration, and in good faith, acquires a good title, although the person who negotiates them has no authority to do so (d).

3. An auctioneer, in the ordinary course of business, and not in breach of trust, paid the proceeds of sales into his own account at a bank. The bankers retained the amounts so paid in for an overdraft of the auctioneer, and closed the account. Held, that the principal had no remedy against the bankers, although they had notice that the money was substantially the proceeds of sales. Otherwise, if the auctioneer had been guilty of a breach of trust in so paying in the money, and the bankers had been aware of that (e). So, a banker is entitled to set off what is due to a customer on one account against what is due from him on another, though the money so set off be trust money, provided that the banker has no notice of the trust (f).

Article 86.

SALES IN MARKET OVERT.

Where an agent sells goods in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided that he buys them in good faith and without notice of any want of authority on the part of the agent (g).

(c) *Goodwin v. Roberts* (1876), 1 App. Cas. 476; 45 L. J. Ex. 748, H. L.; *Rumball v. Metropolitan Bank* (1877), 2 Q. B. D. 194; 46 L. J. Q. B. 346; *Wookey v. Pole* (1820), 4 B. & A. 1; *Edelstein v. Schuler*, [1902] 2 K. B. 144; 71 L. J. K. B. 572; *Bechuanaland, etc., Co. v. London Trading Bank*, [1898] 2 Q. B. 658; 67 L. J. Q. B. 986.

(d) *London Joint Stock Bank v. Simmons*, [1892] A. C. 201; 61 L. J. Ch. 723, H. L.; *Bentinck v. London Joint Stock Bank*, [1893] 2 Ch. 120; 62 L. J. Ch. 358; *Mutton v. Peat*, [1900] 2 Ch. 79; 69 L. J. Ch. 484, C. A.; *Lloyds Bank v. Swiss Bankverein* (1913), 108 L. T. 143, C. A. Comp. *Sheffield v. London Joint Stock Bank* (1888), 13 App. Cas. 333; 57 L. J. Ch. 986, H. L.

(e) *Marten v. Rocks* (1885), 53 L. T. 946; *Thomson v. Clydesdale Bank*, [1893] A. C. 282; 62 L. J. P. C. 91, H. L. Sc.; *Shields v. Bank of Ireland*, [1901] 1 Ir. R. 222. And see Article 111, Illustration 3; Article 137.

(f) *Union Bank of Australia v. Murray-Aynsley*, [1898] A. C. 693, P. C.; *Bank of New South Wales v. Goulburn Valley Butter Factory*, [1902] A. C. 543; 71 L. J. P. C. 112.

(g) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 22 (1).

Article 87.

DISPOSITIONS PROTECTED BY THE FACTORS ACT, 1889 (A).

Where a mercantile agent (*i*) is, with the consent of the owner (*k*), in possession (*l*) of goods (*m*), or of the documents of title (*n*) to goods, any sale, pledge (*o*), or other disposition (*p*) of the goods made by him when acting in the ordinary course of business of a mercantile agent (*q*) is as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not, at the time of the disposition, notice that the agent has not authority to make the same (*r*).

Provided further that—

- (a) where the goods are pledged, without authority, for an antecedent debt or liability of the pledgor, the pledgee acquires no further right to the goods than could have been enforced by the pledgor at the time of the pledge (*s*);
- (b) the consideration for the disposition may be any valuable consideration, but where the goods are pledged, without authority, in consideration of the delivery or transfer of other goods or documents of title to goods, or of a negotiable security, the pledgee acquires no right or interest in the goods so pledged

(*h*) 52 & 53 Vict. c. 45.

(*i*) For definition of mercantile agent, see s. 1 (1); Article 2.

(*k*) Presumed in the absence of evidence to the contrary: s. 2 (4).

(*l*) A person is deemed to be in possession of the goods or documents when they are in his actual custody, or are held by any other person subject to his control, or for him, or on his behalf: s. 1 (2). The possession must be that of a mercantile agent, as such: *Staffs Motor Guarantee v. British Wagon Co.*, [1934] 2 K. B. 305; 103 L. J. K. B. 613.

(*m*) The expression "goods" includes wares and merchandise: s. 1 (3). It does not include certificates of stock: *Freeman v. Appleyard* (1862), 32 L. J. Ex. 175; 1 N. R. 30.

(*n*) The expression "documents of title" includes any bill of lading, dock warrant, warehouse keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising, or purporting to authorise, either by indorsement or delivery, the possessor of the document to transfer or receive goods thereby represented: s. 1 (4).

(*o*) "Pledge" includes any contract pledging or giving a lien or security on goods, whether in consideration of an original advance, or of any further or continuing advance, or of any pecuniary liability: s. 1 (5). See *Jewan v. Whitworth* (1866), L. R. 2 Eq. 692; 36 L. J. Ch. 127; *Sheppard v. Union Bank* (1862), 31 L. J. Ex. 154; 7 H. & N. 661.

(*p*) Entrusting goods to an auctioneer for sale is not a pledge or other disposition within the meaning of the Act, though the auctioneer make advances on the goods: *Waddington v. Neale* (1907), 96 L. T. 786.

(*q*) See note to this Article, p. 182, *post*.

(*r*) S. 2 (1). Where the agent has, with such consent, been in possession of the goods or documents, a disposition which would have been valid if the consent had continued, is valid notwithstanding determination of the consent, if the person taking under the disposition had not, at the time thereof, notice that the consent has been determined: see s. 2 (2).

Where the agent has obtained possession of documents of title through being, or having been, with such consent, in possession of the goods or of other documents of title to them, his possession of the former documents is deemed to be with such consent: see s. 2 (2). As to notice, see Article 89.

(*s*) S. 4; Illustration 1.

in excess of the value of the goods, documents, or security when so delivered or transferred in exchange (t).

For the purposes of this article—

- (a) a pledge of the documents of title to goods is deemed to be a pledge of the goods (u);
- (b) a person is not deemed to act in good faith and without notice if the circumstances of the particular case are such as would lead a reasonable business man to believe that the agent is exceeding his authority or acting in bad faith (x);
- (c) in the case of a disposition to two or more persons who are acting in the transaction as partners, want of good faith on the part of any one of them will deprive them all of the protection of the statute (y).

This article applies only to mercantile agents (z).

Illustrations.

1. A broker is authorised to sell goods, and is intrusted with the bill of lading for them by the owner thereof. By means of the bill of lading he obtains dock warrants for the goods, and without the authority of the principal, pledges the warrants with his banker as security for an overdraft, the banker taking them in good faith, and without notice that in so pledging them he is exceeding his authority. Before receiving notice of the want of authority, the banker, on the faith of the pledge, permits the overdraft to be increased. So far as concerns the overdraft existing at the time of the pledge, the principal is only bound by the pledge to the extent of any lien the broker had on the goods at that time, and may redeem the goods upon payment to that extent, and payment of the amount overdrawn since the date of the pledge. If the broker has a lien in excess of the full amount of the overdraft, the principal must, if required, also pay to the broker the amount of the excess before he is entitled to redeem the goods (a).

(t) S. 5.

(u) S. 3; Illustration 1. The transfer of a document may be by indorsement, or, where the document is, by custom or by its express terms, transferable by delivery, or makes the goods deliverable to the bearer, then by delivery: s. 11.

(x) *Gobind Chunder Sein v. Ryan* (1861), 9 Moo. Ind. App. 140, P. C.; *Navulshaw v. Brownrigg* (1852), 2 De G. M. & G. 441; 21 L. J. Ch. 908; *Douglas v. Ewing* (1867), 6 Ir. C. L. R. 395, Ir.; *Leahey v. Robinson* (1844), 13 L. J. Ex. 213; 12 M. & W. 745; *Mehra v. Sutton* (1913), 109 L. T. 529, C. A.

(y) *Oppenheimer v. Frazer*, [1907] 2 K. B. 50; 76 L. J. K. B. 806, C. A.

(z) Illustrations 5 to 7. *Lewis v. Ramadale* (1886), 55 L. T. 179; *Ingis v. Robertson*, [1898] A. C. 616; 67 L. J. P. C. 108, H. L. Sc. An agreement made with a mercantile agent through a clerk, or other person authorised in the ordinary course of business to make contracts, is deemed to be an agreement with the agent: s. 6. The Act is in amplification and not in derogation of other powers of an agent: s. 13. But nothing therein authorises an agent to exceed his authority, as between him and his principal; or prevents the owner from recovering goods from an agent or his trustee in bankruptcy before a sale or pledge; or from redeeming pledged goods, before sale, on satisfying the claim for which they were pledged and paying to the agent, if required, money in respect of which he would have a lien; or from recovering from a pledgee any balance in his hands, as the produce of sale, after deducting the amount of his lien: see s. 12.

(a) S. 12 (2).

2. A factor is intrusted with the possession of goods for sale. The principal revokes his authority, and demands the return of the goods. The factor refuses to return the goods, and then fraudulently sells and delivers them to a person who purchases them in good faith, and without notice that the factor has not authority to sell them, or that he is in possession of the goods without the consent of the owner. The principal is bound by the sale, but may sue in his own name for the price, subject to any right of set-off the purchaser may have against the factor (b). The factor is civilly and criminally liable for the fraudulent breach of duty to the same extent as he would have been if the Factors Act had not been passed (c).

3. A factor in possession of goods with the consent of the owner, pledges them with A for an advance. Subsequently, the factor, with the consent of A, obtains an advance from B upon the security of the same goods. The principal is bound by both advances, provided that A and B acted in good faith and without notice that the factor had not authority so to act (d). So, if the advances be made to a third person at the request of the factor (e).

4. A home agent employed by a foreign principal to negotiate sales in London obtains an offer from A, which the principal accepts. The principal specially indorses to A the bill of lading for the goods, and sends it to the agent to be exchanged for A's acceptance. The agent, without the principal's authority, agrees with A to cancel the contract, and subsequently induces him to indorse the bill of lading by representing that it was specially indorsed by mistake, and then, having obtained possession of the goods by means of the bill of lading, pledges them for an advance. The pledge is not protected by the Factors Act, because the agent did not obtain possession of the goods with consent of the principal. The principal, therefore, is entitled to recover the goods from the pledgee (f).

5. An agent occupies a furnished house, and has the control of the furniture therein, with the consent of the owner of the furniture. A third person makes advances on the security of the furniture, believing the agent to be the owner thereof. The transaction is not protected by the Factors Act (g).

6. A wine merchant's clerk, permitted to have the possession for the purpose of his master's business of dock warrants for wine belonging to his master, fraudulently pledges the warrants for an advance to himself. The transaction is not protected by the Factors Act, because the clerk is not a mercantile agent within the meaning of the Act (h).

7. A, a manufacturing jeweller, supplies jewellery to B, a retail jeweller, on sale or return, on the terms that it is to remain the property of A until it is sold or paid for, B, after selling it, to retain half the difference between the cost price and selling price, by way of remuneration, and to remit the

(b) S. 12 (3). See *Moody v. Pall Mall, etc., Co.* (1917), 33 T. L. R. 308.

(c) S. 12 (1).

(d) *Portalis v. Tetley* (1867), L. R. 5 Eq. 140; 37 L. J. Ch. 139.

(e) *Sheppard v. Union Bank* (1862), 7 H. & N. 661; 31 L. J. Ex. 154.

(f) *Vaughan v. Moffatt* (1868), 38 L. J. Ch. 144.

(g) *Wood v. Rowcliffe* (1846), 6 Hare, 191.

(h) *Lamb v. Attenborough* (1862), 31 L. J. Q. B. 41; 1 B. & S. 831. See also *Farquharson v. King*, [1902] A. C. 325; 71 L. J. K. B. 667, H. L.

balance of the proceeds to A. B is merely A's agent for sale, and therefore a mercantile agent within the meaning of the Act (i).

8. A company pledged bills of lading with A, a bank, as security for bills of exchange or advances. A handed the bills of lading back to the company upon terms contained in trust receipts, whereby the company was authorised to sell the goods and undertook to hold the proceeds in trust for A. The company pledged the bills of lading with B, a bank, to secure advances. B acted in good faith and without notice that the company was not entitled so to pledge the bills of lading. A claimed the bills of lading from B. Held, that A was owner of the goods represented by the bills of lading, within the meaning of the Factors Act; but that the company was a mercantile agent in possession of the bills of lading within the meaning of the Act and that the pledge to B was valid (k).

Possession by consent of the owner.—Where the owner consents to possession by the agent, the operation of the Act is not defeated by the fact that consent was obtained by fraud; and the agent may give a good title to a buyer or pledgee, although the agent obtained the goods by false pretences, or through larceny by a trick (l). But where the owner is induced to part with possession by fraudulent misrepresentation as to the identity of the person with whom he is dealing (if such identity be material), there is no real consent to the transfer of possession (m).

Ordinary course of business.—It is not necessary that the pledge or other disposition should be in the ordinary course of business of the particular mercantile agent, and evidence of a custom of a particular trade excluding authority to pledge goods intrusted to a mercantile agent in that trade is not admissible for the purpose of limiting the protection given by the Act (n). A diamond broker may be acting in the ordinary course of business of a mercantile agent within the meaning of the Act, in pledging diamonds intrusted to him for sale, although by the custom of the trade such a broker has no authority to pledge diamonds so intrusted to him (n). And a pledge of diamonds or jewellery to a pawnbroker or money-lender is not necessarily outside the ordinary course of business because the loan may carry 20 or 30 per cent. interest (o). The charging of a high rate of interest is only material as evidence that the pledgee did not act in good faith, or that he had notice that the agent had no authority to make the pledge (p). It is not, however, in the ordinary course of business for an agent to ask a friend to pawn goods

(i) *Weiner v. Harris*, [1910] 1 K. B. 285; 79 L. J. K. B. 342, C. A.

(k) *Lloyds Bank v. Bank of America National Trust and Savings Association*, [1938] 2 K. B. 147; 107 L. J. K. B. 538, C. A.

(l) *Folkes v. King*, [1923] 1 K. B. 282; 92 L. J. K. B. 125, C. A.; *London Jewellers v. Attenborough*, [1934] 2 K. B. 206; 103 L. J. K. B. 429, C. A.

(m) *Lake v. Simmons*, [1927] A. C. 487, H. L.; and see *Heap v. Motorists' Advisory Agency*, [1923] 1 K. B. 577, 585.

(n) *Oppenheimer v. Attenborough*, [1908] 1 K. B. 221; 77 L. J. K. B. 209, C. A.

(o) *Oppenheimer v. Attenborough*, *supra*; *Weiner v. Harris*, *supra* (overruling *Hastings v. Pearson*, [1893] 1 Q. B. 62; 62 L. J. Q. B. 75, where it was held that a pledge with a pawnbroker by an agent intrusted with jewellery for sale was not protected by the Act). It is not within the scope of this work to discuss the soundness of these decisions, both of which were unanimous, though they are obviously open to criticism.

(p) *Janesch v. Attenborough* (1910), 102 L. T. 605.

intrusted to him. In order that a pledge may be protected, the agent must pledge the goods himself or by a servant or agent employed in the ordinary course of business (q).

Article 88.

LIEN OF CONSIGNEE FOR ADVANCES TO APPARENT OWNER OF GOODS.

Where the owner of goods has given possession thereof to an agent for the purpose of consignment or sale, or has shipped goods in the name of an agent, and the consignee of the goods has not had notice that the agent is not the owner thereof, the consignee in respect of advances made to or for the use of the agent, has the same lien on the goods as if the agent were the owner thereof, and may transfer any such lien to another person; provided that nothing in this article limits or affects the validity of any sale, pledge, or other disposition by a mercantile agent (r).

Article 89.

NO UNAUTHORISED ACT BINDING WITH RESPECT TO PERSONS WITH NOTICE.

No act done by an agent in excess of his actual authority is binding on the principal with respect to persons having notice that in doing the act the agent is exceeding his authority (s).

Where the regulations of a company are registered, persons dealing with the directors and other agents of the company are for the purposes of this article deemed to have notice of such regulations (t).

A signature "per procuration" on a bill of exchange, promissory note, or cheque, operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority (u).

(q) S. 6; *De Gorier v. Attenborough* (1905), 21 T. L. R. 19; *Folkes v. King*, [1923] 1 K. B. 282; 92 L. J. K. B. 125, C. A. In *Biggs v. Evans*, [1894] 1 Q. B. 88, it was held that a sale by a mercantile agent was not in the ordinary course of business because of the unusual mode of payment.

(r) Factors Act, 1889 (52 & 53 Vict. c. 45), s. 7. See Article 87.

(s) See Illustrations. *Forman v. The Liddesdale*, [1900] A. C. 190; 69 L. J. P. C. 44; *Russo-Chinese Bank v. Li Yau Sam*, [1910] A. C. 174; 79 L. J. P. C. 60; *Doey v. L. & N. W. Ry.*, [1919] 1 K. B. 623; 88 L. J. K. B. 737.

(t) Illustration 9.

(u) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 25; *Midland Bank v. Reckitt*, [1933] A. C. 1; 102 L. J. K. B. 297, H. L. (Article 82, Illustration 2); *Alexander v. Mackenzie* (1848), 18 L. J. C. P. 94; 6 C. B. 766; *Attwood v. Munnings* (1827), 7 B. & C. 278; *Stagg v. Elliott* (1862), 31 L. J. C. P. 260; 12 C. B. (n.s.) 373; *Reid v. Rigby*, [1894] 2 Q. B. 40; 63 L. J. Q. B. 451; *Gompertz v. Cook* (1904), 20 T. L. R. 106; *Morison v. Kemp* (1912), 29 T. L. R. 70; *Comp. Bryant v. Quebec Bank*, [1893] A. C. 179; 62 L. J. P. C. 73, P. C.; *Smith v. McGuire* (1858), 3 H. & N. 554; 27 L. J. Ex. 465.

Illustrations.

1. A broker in possession of goods upon which he has a lien for advances, pledges the goods for valuable consideration to a person who has notice that in so pledging them the broker is exceeding his authority. The transaction is not protected by the Factors Act, and the pledgee acquires no right to retain the goods as against the principal, even to the extent of the broker's lien, the lien not being transferable by such an unauthorised act (x).

2. A authorised his son to take delivery of a mare, provided that a certain warranty was given, and told the owner so. The son took away the mare without the warranty in question. Held, that the son's act did not amount to an acceptance of the mare, so as to bind the father (y).

3. A paid money to a broker for a specific purpose. B, knowing that the money belonged to A, obtained it from the broker under pretence of a loan for a few days, and then claimed it for a debt due to him from the broker. Held, that B was liable to repay the amount to A (z). So, the transferee of a bank note acquires no title thereto if he take it with notice that the transfer is fraudulent (a).

4. An agent, purporting to act under a power of attorney, which he represented gave him full power to borrow, borrowed money from A, and misapplied it. The agent produced the power, which did not in fact authorise the loan, but A acted on his representation, and did not read the power. Held, that A must be taken to have had notice of the terms of the power, and that the principal was not bound by the loan (b).

5. A accepts a bill of exchange drawn by B, and delivers it to B to be held by him for A's use. B indorses the bill to C for a loan, having told C that it belongs to A, and that he (B) has no authority to deal with it. A is entitled to recover the bill or its value from C (c).

6. A consigns goods to B, who agrees to deal with the proceeds in a particular manner. B borrows money from C, a banker, and agrees that the proceeds of the goods shall be applied in repayment of the loan, C having notice of the agreement between A and B. The proceeds afterwards come to C's hands. C must apply them according to the agreement between A and B, and cannot retain them in repayment of the loan (d).

7. A indorses a bill of exchange "pay B or order for my use." B's bankers discount the bill and pay the proceeds to B's account. The bankers are liable to A for the amount, because the restrictive indorsement operated as notice that the bill did not belong to B (e). So, where A gave bills to his agent

(x) *M'Combie v. Davies* (1805), 7 East, 5; *Daubigny v. Duval* (1794), 5 T. R. 604.

(y) *Jordan v. Norton* (1838), 4 M. & W. 155.

(z) *Litt v. Martindale* (1856), 18 C. B. 314; *Muttyloll Seal v. Dent* (1853), 8 Moo. P. C. 319.

(a) *Solomons v. Bank of England* (1810), 13 East, 135.

(b) *Jacobs v. Morris*, [1902] 1 Ch. 816; 71 L. J. Ch. 363, C. A.

(c) *Evans v. Kymer* (1830), 1 B. & Ad. 528.

(d) *Steele v. Stuart* (1866), 14 L. T. 620; *Thayer v. Lister* (1861), 30 L. J. Ch. 429. And see Article 111, Illustration 3.

(e) *Sigourney v. Lloyd, Lloyd v. Sigourney* (1828), 5 Bing. 525. And see *Watkin v. Lamb* (1901), 85 L. T. 463.

indorsed "on account of A," it was held that the agent could give no title to a pledgee, the indorsement operating as notice that he had no authority to pledge the bills (f).

8. The directors of a company instructed a broker to purchase, on behalf of the company, some of the company's own shares. The broker purchased and paid for the shares, and the company credited him with the amount. Held, that the transaction being *ultra vires* to the knowledge of the broker, the liquidator of the company was entitled to deduct the amount so credited from the debt for which the broker proved in the winding-up of the company (g).

9. The directors of a company enter into a contract which is beyond the scope of the authority given to them by the articles of association. The company is not bound by the contract (h). Otherwise if the contract had been within the scope of the authority of the directors, and they had merely omitted to observe the formalities required by the articles of association, the other contracting party not having notice of such omission (i).

Sect. 2.—*Rights and Liabilities of the Principal on Contracts made by Agent.*

Article 90.

CROWN MAY SUE OR BE SUED ON CONTRACTS MADE BY PUBLIC AGENT.

The Crown may sue, or may be sued by petition of right, on any contract duly made on its behalf by a public agent (k).

Article 91.

PRINCIPAL MAY SUE OR BE SUED IN HIS OWN NAME.

Every principal, whether disclosed or undisclosed, may sue or be sued in his own name on any contract duly made on his behalf (l), and in respect of any money paid or received by his agent on his behalf (m). Provided always that the right of the principal to sue, and his liability to be sued, on a contract made by his agent, may be excluded by the terms of the contract (n).

Where an agent enters into a contract, oral or written, in his own name, parol evidence is admissible to show who is

(f) *Treutell v. Barandon* (1817), 1 Moo. 543.

(g) *Zulueta's Claim* (1870), L.R. 5 Ch. 444; 39 L. J. Ch. 598.

(h) *Balfour v. Ernest* (1859), 5 C. B. (n.s.) 601; 28 L. J. C. P. 170; *Re Arthur Average Assn.* (1876), 34 L. T. 942.

(i) See Article 82, Illustrations 15 and 16, and cases there cited.

(k) *Thomas v. R.* (1874), L. R. 10 Q. B. 31; 44 L. J. Q. B. 9. See Articles 1 and 115.

(l) Illustrations 1 to 5. *Browning v. Provincial Ins. Co.* (1873), L. R. 5 P. C. 263, P. C.; *Bell v. Plumbly* (1900), 16 T. L. R. 393. Article 90, Illustrations 5 to 7.

(m) Illustrations 6 to 8. *Evans v. Collins* (1844), 5 Q. B. 804.

(n) Illustration 10. *M'Auliffe v. Bicknell* (1835), 2 C. M. & R. 263; *Collins v. Associated Greyhound Racecourses*, [1903] 1 Ch. 1; 99 L. J. Ch. 52, C. A.

the real principal, in order to charge him or entitle him to sue on the contract (*o*), provided that such evidence is not inconsistent with the terms of a written contract (*p*).

The right and liability of a principal, whether disclosed or undisclosed, to sue and be sued in his own name on a contract made on his behalf, are not affected by the circumstances that the contract is to be partly performed by the agent and that from the terms thereof the consideration appears to move from the agent alone (*q*); nor by the circumstance that the agent was acting as a *del credere* agent (*r*).

This article, so far as concerns undisclosed principals, does not apply to foreign principals, nor to deeds, bills of exchange, promissory notes, or cheques (*s*).

Illustrations.

1. A factor, acting on behalf of his principal, sells goods in his own name. The principal may sue for the price (*t*). But if an agent sell goods in his own name to a person who believes him to be the principal and who contracts with him for a reason personal to the agent, *e.g.*, that the agent is the debtor of such person, the principal cannot sue upon the contract of sale (*u*).

2. A wife, who carried on a business on behalf of her husband upon premises of which she was tenant and in respect of which she paid the rates, ordered goods for the business in her own name. Held, that the husband was liable for the price of the goods (*x*).

3. S, a solicitor, practised in the name of S and C. C was also a solicitor, but acted as clerk to S. Held, that S, being the real principal, was entitled to sue alone upon a contract made in the name of the firm (*y*).

4. A part-owner of a whaling vessel sold whale oil in his own name. Held, that the owners were entitled to sue jointly for the price, though the purchaser did not know that any person besides the seller was interested (*z*). So, if three persons agree that one of them shall buy goods in his own name on their joint behalf, they may jointly sue the seller for breach of a contract made in pursuance of such agreement (*a*).

5. The law clerk of the trustees of a public road retains a parliamentary agent on behalf of the trustees. The trustees are directly liable to the agent for his costs, in the absence of an agreement to the contrary (*b*).

(*o*) Illustration 11. *Morris v. Wilson* (1859), 5 Jur. (n.s.) 168; *Calder v. Dobell* (1871), L. R. 6 C. P. 486; 40 L. J. C. P. 224; *Wilson v. Hart* (1817), 1 Moore, 45; *Weidner v. Hoggatt* (1876), 1 C. P. D. 533; *Trueman v. Loder* (1840), 11 A. & E. 589.

(*p*) Illustration 12.

(*q*) *Phelps v. Prothero* (1855), 24 L. J. C. P. 225; 16 C. B. 370.

(*r*) *Hornby v. Lacy* (1817), 6 M. & S. 166.

(*s*) See Articles 92 to 94.

(*t*) *Sadler v. Leigh* (1815), 4 Camp. 195.

(*u*) *Greer v. Downs Supply Co.*, [1927] 2 K. B. 28; 96 L. J. K. B. 534, C. A.

(*x*) *Petty v. Anderson* (1825), 3 Bing. 170. Comp. *Smallpiece v. Dawes* (1835), 7 C. & P. 40.

(*y*) *Spurr v. Cass*, *Cass v. Spurr* (1870), L. R. 5 Q. B. 656; 39 L. J. Q. B. 249; *Kell v. Nainby* (1829), 10 B. & C. 20.

(*z*) *Skinner v. Stocks* (1821), 4 B. & Ald. 437.

(*a*) *Cothay v. Fennell* (1830), 10 B. & C. 871.

(*b*) *Ridgway v. Lees* (1856), 25 L. J. Ch. 584.

6. An agent entered into a contract in his own name for the purchase of property, and paid a deposit: Held, that on the default of the vendor, the principal was entitled to sue in his own name for the return of the deposit (c).

7. A custom-house officer took exorbitant fees from a shipmaster. Held, that the owner of the vessel had a right to sue in his own name to recover the amount paid in excess of the proper fees (d).

8. An agent appointed by the managing owner of a ship demanded too much freight from the consignees of certain goods, and refused to deliver the goods until payment. The consignees paid the amount demanded, under protest, and sued one of the part-owners of the ship for the excess. Held, that the defendant was liable, though no portion of the money had come to, his hands (e).

9. An auctioneer receives a deposit at a sale by auction. Though it is his duty to hold the deposit as a stakeholder, he is so far the agent of the vendor in receiving it, that the vendor is responsible to the purchaser in the event of a loss through the insolvency of the auctioneer (f).

10. A is the managing part-owner of a ship. He becomes a member of a mutual insurance association, and insures the ship under the rules and regulations of that association. By the terms of the policy and rules of of the association, the right to recover in respect of losses, and the liability for contributions in the nature of premiums, are confined to members of the association. The other part-owners, not being members of the association, cannot as undisclosed principals of A sue for any losses, nor can they be sued for contributions due in respect of the policy, even if A fail to pay them, because the right and liability of the principals to sue and be sued are excluded by the terms of the contract (g). Otherwise, if the liability for contributions be thrown by the policy on the persons assured, without reference to whether they are members of the association or not; or if it be provided that the persons assured shall be liable therefor as if they were members (h).

11. A signs and addresses a letter to B, undertaking to answer for a certain debt due from C, D being in fact the creditor. Parol evidence is admissible to prove that the letter was addressed to B as D's agent, so as to entitle D to sue A on the guarantee, though D is not named in the letter, and it was addressed to B as if B were the creditor (i).

12. An agent executed a charterparty in his own name, and was described in the contract as the owner of the vessel. It was held that the principal

(c) *Norfolk v. Worthy* (1808), 1 Camp. 337.

(d) *Stevenson v. Mortimer* (1778), Cowp. 805.

(e) *Coulhurst v. Sweet* (1866), L. R. 1 C. P. 649.

(f) *Rowe v. May* (1854), 18 Beav. 613; *Annesley v. Muggridge* (1816), 1 Madd. 596; *Smith v. Jackson* (1816), 1 Madd. 620.

(g) *United Kingdom, etc., Ass. v. Nevill* (1887), 19 Q. B. D. 110; 56 L. J. Q. B. 522, C. A.; *Montgomery v. U. K., etc., Ass.*, [1891] 1 Q. B. 370; 60 L. J. Q. B. 429.

(h) *Ocean, etc., Ins. Ass. v. Leslie* (1889), 22 Q. B. D. 722; *Great Britain, etc., Ass. v. Wyllie* (1889), 22 Q. B. D. 710; 58 L. J. Q. B. 614, C. A.; *British Marine, etc., Ass. v. Jenkins*, [1900] 1 Q. B. 299; 69 L. J. Q. B. 177.

(i) *Bateman v. Phillips* (1812), 15 East, 272.

was not entitled to give evidence to show that the agent contracted on his behalf, so as to enable him to maintain an action on the contract, because such evidence was inconsistent with the statement that the agent was the owner of the vessel (*k*).

Article 92.

FOREIGN PRINCIPALS.

No foreign principal may sue or be sued on any contract made by a home agent, unless the agent had authority to establish privity of contract between the principal and the other contracting party, and it clearly appears from the terms of the contract, or from the surrounding circumstances, that it was the intention of the agent and of the other contracting party to establish such privity of contract (*l*).

Article 93.

DEEDS.

No principal may sue or be sued on any deed, even if it be expressed to be executed on his behalf, unless he be described as a party thereto and it be executed in his name (*m*); but where an agent, who has entered into a deed in his own name, is a trustee for his principal of the rights under the deed, the principal may enforce such rights, in the name of the agent, in proceedings to which the agent is a party, as plaintiff or as defendant (*n*).

This article is subject to the Law of Property Act, 1925 (*o*), s. 123 (1) which provides that the donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument or thing in and with his own name and signature, and under his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

(*k*) *Humble v. Hunter* (1848), 12 Q. B. 310; 17 L. J. Q. B. 350. Cp. *Drughorn v. Rederi A/B Transatlantic*, [1919] A. C. 203; 88 L. J. K. B. 233, H. L.; *Rederi A/B Argonaut v. Hani*, [1918] 2 K. B. 247; 87 L. J. K. B. 901; *Formby v. Formby* (1910), 102 L. T. 116, C. A.; but see *Danziger v. Thompson* [1944] W. N. 143.

(*l*) *Paterson v. Gandasegui* (1812), 15 East, 62; *Smyth v. Anderson* (1849), 18 L. J. C. P. 109; 7 C. B. 21; *Dramburg v. Pollitzer* (1873), 28 L. T. 470; *Elbinger, etc. v. Clays* (1873), L. R. 8 Q. B. 313; 42 L. J. Q. B. 151; *Hutton v. Bulloch* (1874), L. R. 9 Q. B. 572; *Plinn v. Hoyle* (1893), 63 L. J. Q. B. 1, C. A.; *Harper v. Keller* (1915), 84 L. J. K. B. 1696; *Miller v. Smith*, [1917] 2 K. B. 141; 86 L. J. K. B. 1250, C. A.; *Mercer v. Wright* (1917), 33 T. L. R. 843. See also *Armstrong v. Stokes* (1872), L. R. 7 Q. B. 598; 41 L. J. Q. B. 253; *Gadd v. Houghton* (1876), 1 Ex. D. 357; 46 L. J. Ex. 71, C. A.; *Glover v. Langford* (1892), 8 T. L. R. 628.

(*m*) *Chesterfield Colliery Co. v. Hawkins* (1865), 3 H. & C. 677. Illustrations 1 to 4.

(*n*) Illustration 5.

(*o*) 15 Geo. 5, c. 20.

This provision operates without prejudice to any statutory direction that an instrument is to be executed in the name of an estate owner (*p*).

Illustrations.

1. An agent entered into a contract by deed in his own name, the principal not being named therein. It was held that the principal was not liable to be sued on the contract (*q*).

2. A shipmaster executed a charterparty by deed in his own name "as agent for the owners." Held, that the owners were not entitled to sue for the freight, because they were not parties to the deed (*r*).

3. An attorney, who was authorised in writing to execute a lease, signed and sealed the lease in and with his own name and seal. It was held that the principal was not entitled to sue on the covenants in the lease, though they were expressed to be made by the tenant with the landlord, because the deed was not executed in his name (*s*).

4. A by deed transfers shares to B. In consequence of the winding-up of the company, the transfer cannot be registered, and A is compelled to pay a "call." A has no right of action for indemnity against B's principal, for whom B acted in taking the transfer (*t*).

The Law of Property Act, 1925 (*u*), s. 123, applies only to instruments executed in pursuance of a power of attorney, and, apparently, only where the donor of the power expressly gives the donee authority to act in his own name.

5. By a contract under seal made between A and B, A agreed to purchase the copyright in certain periodicals from B. A entered into the contract as agent and trustee for himself and C. Held, in an action brought by C against A and B for a declaration that A was agent and trustee as stated above and for specific performance, that as the agency and trusteeship of A had been established and all necessary parties were before the Court, there was jurisdiction to decree specific performance (*x*).

Article 94.

BILLS, NOTES AND CHEQUES.

The only persons liable on a bill of exchange, promissory note, or cheque, are those whose signatures appear thereon (*y*), and in determining whether a signature is that of the principal,

(*p*) *Ibid.*, s. 123 (2). For such a direction, see *ibid.*, s. 7 (4).

(*q*) In *Re International Contract Co., Pickering's claim* (1871), L. R. 6 Ch. 525.

(*r*) *Schack v. Anthony* (1813), 1 M. & S. 573.

(*s*) *Berkeley v. Hardy* (1826), 8 D. & R. 102; 29 R. R. 261; *Southampton v. Brown* (1827), 6 B. & C. 718. And see *Chapman v. Smith*, [1907] 2 Ch. 97; 76 L. J. Ch. 394.

(*t*) *Torrington v. Lowe* (1868), L. R. 4 C. P. 26; 38 L. J. C. P. 121.

(*u*) 15 Geo. 5, c. 23.

(*x*) *Harmer v. Armstrong*, [1934] Ch. 65; 103 L. J. Ch. 1, C. A.; see also *Vandepitte v. Preferred Accident Insurance Corp. of New York*, [1933] A. C. 70; 102 L. J. P. C. 21, P. C.

(*y*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 23; *Ex p. Rayner, re Waud* (1868), 17 W. R. 64.

or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument is adopted (z). No person can be liable as acceptor of a bill except the person on whom it is drawn, unless it be accepted for honour (a). Hence—

- (a) where a bill is drawn on the principal, the principal is deemed to be the acceptor, whether the acceptance be in his name or in that of the agent (b);
- (b) where a bill is drawn on an agent, the principal is not liable as acceptor, even if it be accepted in his name and with his authority (c);
- (c) where a signature is placed on a bill, note, or cheque, otherwise than as that of the acceptor of a bill of exchange, the principal is liable only if his name be signed, or the signature be expressed to be made on his behalf (d).

Illustrations.

1. A bill of exchange was addressed to "William Bradwell." His wife wrote across it "Mary Bradwell." On the bill being presented to William Bradwell, he said that he knew all about it and would pay it shortly. Held, that he was liable as acceptor, his promise to pay being sufficient evidence of authority or ratification (e).

2. A bill of exchange was addressed to "E. M. and others, trustees of Clarence Temperance Hall," and was accepted by E. M. in his own name. The jury found that E. M. had authority to accept on behalf of all the trustees. Held, that they were all liable as acceptors (f).

3. A bill of exchange was addressed to a company, and was accepted by authorised directors in their own names. Held, that the company was liable as acceptor (g).

4. A bill of exchange is addressed to A B, and is accepted "A B for and on behalf of C D." C D is not liable as acceptor, even if A B were expressly authorised to accept the bill on his behalf (h).

5. A duly authorised agent draws or indorses a bill, or indorses a note or cheque, in his own name. The principal is not liable thereon (i). (A firm is not liable unless either the firm name or the names of all the partners appear (k).)

(z) Bills of Exchange Act, 1882, s. 26 (2).

(a) *Polhill v. Waller* (1832), 1 L. J. K. B. 92; 3 B. & Ad. 114; *Davis v. Clarke* (1844), 6 Q. B. 16; 13 L. J. Q. B. 305.

(b) Illustrations 1 to 3.

(c) Illustration 4.

(d) Illustrations 5 to 7. *Serrell v. Derbyshire Ry.* (1850), 19 L. J. C. P. 371; 9 C. B. 811. (e) *Lindus v. Bradwell* (1848), 17 L. J. C. P. 121; 5 C. B. 583.

(f) *Jenkins v. Morris* (1847), 16 M. & W. 877.

(g) *Okell v. Charles* (1876), 34 L. T. 822, C. A.

(h) *Polhill v. Waller* (1832), 3 B. & Ad. 114.

(i) *Ducarrey v. Gill* (1830), M. & M. 450.

(k) *Re Adanson's Fibre Co., Miles' claim* (1874), L. R. 9 Ch. 635; 43 L. J. Ch. 732; *Ex p. Buckley* (1845), 14 L. J. Ex. 341; 14 M. & W. 469; *Caroline Bank v. Case* (1828), 8 B. & C. 427.

6. By a deed of composition, the business of a debtor was assigned to trustees, in trust to continue the business in the name of the debtor. The debtor, being employed by the trustees to carry on the business, in the ordinary course indorsed bills of exchange in his own name. Held, that the trustees were liable as indorsers, the bills being indorsed in the name in which the business was carried on (*l*).

7. A joint stock company was held liable on a promissory note, sealed with the common seal, in the following form:—"We, two directors of P. Society, by and on behalf of the said society, do hereby promise, etc. (Signed) A B, C D, directors" (*m*).

Article 95.

BROKERS' BOUGHT AND SOLD NOTES.

Where a broker contracts on behalf of both buyer and seller, an entry of the transaction in his book, signed by him, operates as a memorandum of the contract signed by both parties, in compliance with the Sale of Goods Act, 1893, s. 4 (*n*); and a mistake in the bought and sold notes does not affect the validity of such a contract (*o*). Where there is no such signed entry, signed bought and sold notes form a binding contract in writing if they substantially agree (*o*); but not where there is a material variance between them (*p*).

Where a broker acts on behalf of only one of the parties to a contract, and sends a note thereof to the other party, such note forms the contract, and its validity is not affected by the circumstance that there is a variance in a note sent by him to his own principal (*q*).

Article 96.

EFFECT OF PARTICULAR CUSTOMS OR USAGES.

Where an agent contracts in a particular market, the contract is deemed to be made subject to the rules, regulations, customs and usages of that market (*r*), so far as they are not inconsistent

(*l*) *Furze v. Sharwood* (1841), 2 Q. B. 388.

(*m*) *Aggs v. Nicholson* (1856), 1 H. & N. 165.

(*n*) 56 & 57 Vict. c. 71; *Heyman v. Neale* (1809), 2 Camp. 337; *Thompson v. Gardiner* (1876), 1 C. P. D. 777.

(*o*) *Sievesright v. Archibald* (1851), 20 L. J. Q. B. 529; *Kempson v. Boyle* (1865), 34 L. J. Ex. 191; 3 H. & C. 763; *Goom v. Aftalo* (1826), 6 B. & C. 117; *Townend v. Drakeford* (1843), 1 C. & K. 20.

(*p*) *Grant v. Fletcher* (1826), 5 B. & C. 436; *Gregson v. Ruck* (1843), 4 Q. B. 737; *Cowie v. Remfry* (1846), 5 Moo. P. C. 232.

(*q*) *McCaul v. Strauss* (1883), 1 C. & E. 106.

(*r*) *Hodgkinson v. Kelly* (1868), L. R. 6 Eq. 406; 37 L. J. Ch. 837; *Stray v. Russell* (1860), 28 L. J. Q. B. 279; 29 L. J. Q. B. 115, Ex. Ch.; *Graves v. Legg* (1857), 26 L. J. Ex. 316; 2 H. & N. 210; *Case v. McClellan* (1872), 25 L. T. 753; *Kirchner v. Venus* (1859), 12 Moo. P. C. 361, P. C.; *Thornton v. Fehr* (1935), 51 Ll. L. Rep. 330; and see *Illustrations*.

with the express terms of the contract (s). Provided, that the principal is not bound by any unreasonable rule, regulation, custom or usage, unless he had notice thereof, and agreed to be bound thereby, at the time when he authorised the agent to make the contract (t). Provided also that the right of the principal, whether disclosed or undisclosed, to sue in his own name, and his liability to be sued, on a contract made on his behalf, are not affected by the circumstance that it was made in a market, by the rules, regulations, customs or usages of which the agent is personally liable on the contract, and the contract is there regarded as that of the agent alone, whether such rules, regulations, customs or usages were known to the principal at the time when he authorised the agent to make the contract or not (u).

Illustrations.

1. A authorises a member of the Stock Exchange to purchase shares on his behalf. A must indemnify the seller against any liability for calls on the shares subsequent to the contract of sale, though the transfer of the shares, by reason of the winding-up of the company, cannot be registered (x).

2. A contract made on the Stock Exchange for the sale of shares does not import any undertaking by the seller that the company will register the transferee as a shareholder (y).

But it imports that he will do nothing to prevent such registration (z). And a similar rule governs the obligation of a person who, as principal, sells the shares of another. So, where a firm of solicitors instructed brokers to sell shares belonging to A, and sent to them the share certificate and a blank transfer signed by A; and the brokers sold the shares and remitted the proceeds to the solicitors; but A objected to the registration of the transfer; and the brokers purchased other shares to implement their bargain with the buyer: it was held that the solicitors were acting as principals in the transaction; that their obligation was to deliver to the brokers a transfer signed by a transferor who was, and would remain, willing that the transfer should be registered; and that they were liable to indemnify the brokers for the cost of the shares bought in substitution (a).

3. A employs B, a broker, to sell shares on the Stock Exchange. B sells the shares to C, a jobber, who also is a member of the Stock Exchange. C gives the name of D as purchaser to whom A executes a transfer, and who duly pays for the shares. D does not execute the transfer nor register himself as a shareholder, in consequence of which A is compelled to pay a call in the winding-up of the company. By the usage of the Stock Exchange,

(s) *The Alhambra* (1881), 6 P. D. 68; 50 L. J. C. P. 36, C. A.; *Hayton v. Irwin* (1879), 5 C. P. D. 130, C. A. Illustration 2.

(t) *Sweeting v. Pearce* (1859), 7 C. B. (N.S.) 449; 29 L. J. C. P. 265; *Pearson v. Scott* (1878), 9 Ch. D. 198; 47 L. J. Ch. 705.

(u) Illustrations 5 to 7.

(x) See note (d), next page.

(y) *London Founders Ass. v. Clarke* (1888), 20 Q. B. D. 576; 57 L. J. Q. B. 291, C. A.; *Casey v. Beniley*, [1902] 1 Ir. R. 376, C. A.

(z) *Hooper v. Harts*, [1906] 1 Ch. 549; 75 L. J. Ch. 253, C. A.

(a) *Hitchens v. Jackson*, [1943] A. C. 266; 112 L. J. K. B. 88, H. L.

a jobber who contracts to purchase shares is bound either to purchase them himself, or to substitute the name of another person who is competent and willing to purchase them; and if such name be not objected to within a certain time limited for that purpose, the jobber is discharged from all liability on the contract. Such usage is reasonable, and C is not liable to indemnify A in respect of the call, though D may be insolvent (*b*). But the jobber is not discharged, unless he give the name of a person who is competent to contract, and who can be legally compelled to accept a transfer of the shares. If he give the name of an infant, or of a person who has not authorised his name to be given as a purchaser, he continues to be personally liable on the contract, and must indemnify the seller against liability for calls (*c*). Where a jobber purchases shares "with registration guaranteed," he is bound to register them in his own name in default of registration by the person whose name he gives as a purchaser, because the usage discharging him from liability is inconsistent with the express terms of the contract (*d*).

4. A, through his broker, sells on the Stock Exchange one hundred shares to a jobber, who duly gives the names of B, C, D and E as purchasers of twenty-five shares each. The names are accepted by A, who executes transfers accordingly, and the jobber pays him the price of the shares. In consequence of the winding-up of the company, the transfers cannot be registered. The jobber is discharged from liability to A, and A is entitled to specific performance and indemnity against B, C, D and E respectively, their brokers having duly accepted the transfers and certificates of the shares on their behalf (*e*).

5. A authorises B, a broker and member of the Stock Exchange, to purchase one hundred shares in a certain company. B purchases the shares from a jobber, and passes a ticket with the name of A as purchaser. The ticket is split, according to usage, and a part thereof for fifteen shares is handed to C's brokers, who had contracted to sell that number to the jobber. C executes a transfer of fifteen shares to A, and the transfer and certificates are accepted by B on A's behalf. A refuses to accept the shares, and the company being wound up C is compelled to pay calls. A must indemnify C in respect of the calls (*f*).

6. A broker contracts on the Stock Exchange for an undisclosed principal. The principal may sue in his own name on the contract, even if he were aware, at the time when he employed the broker, that by the rules of the Exchange the broker is personally liable, and is regarded as the contracting party (*g*).

(*b*) *Grissell v. Bristowe* (1869), L. R. 4 C. P. 36; 38 L. J. C. P. 10, Ex. Ch.; *Marted v. Paine* (1869), L. R. 4 Ex. 203; 38 L. J. Ex. 129.

(*c*) *Nickalls v. Merry* (1875), L. R. 7 H. L. 530; 45 L. J. Ch. 575, H. L.; *Marted v. Paine* (1869), L. R. 4 Ex. 203; 38 L. J. Ex. 129. See also *Queensland Investment Co. v. O'Connell* (1896), 12 T. L. R. 502.

(*d*) *Cruse v. Paine* (1869), L. R. 4 Ch. 441; 38 L. J. Ch. 225.

(*e*) *Coles v. Bristowe* (1868), L. R. 4 Ch. 3; 38 L. J. Ch. 81; *Hawkins v. Maltby* (1869), L. R. 4 Ch. 200; 38 L. J. Ch. 313; *Shepherd v. Gillespie* (1869), 38 L. J. Ch. 67.

(*f*) *Bowring v. Shepherd* (1871), L. R. 6 Q. B. 309, Ex. Ch.; *Brown v. Black* (1873), L. R. 8 Ch. 939; 42 L. J. Ch. 814.

(*g*) *Langton v. Waite* (1868), L. R. 6 Eq. 165; 37 L. J. Ch. 345; *Humphrey v. Lucas* (1845), 2 C. & K. 152; *Lissel v. Reave* (1742), 2 Atk. 394; *Currie v. Booth* (1902), 7 Com. Cas. 77, C. A.

7. A, a broker, buys shares on the Stock Exchange in his own name, the principal being undisclosed. A becomes a defaulter, and his transactions are closed by the Official Assignee. The jobber from whom A bought the shares tenders them to the principal and calls upon him to complete the contract. The principal is bound to complete, and if he refuse to do so, the jobber is entitled to sell the shares on the market and recover any differences from the principal (*h*). The rules of the Stock Exchange as to buying in and selling out do not apply to such cases, but only as between members of the Stock Exchange, and the principal cannot, as between himself and the jobber, claim to have his transactions closed at the prices fixed by the Official Assignee for the closing of the transactions of the defaulting broker (*h*). Nor is the right of the jobber to recover against the principal affected by his having claimed and received the difference between the contract and hammer prices from the broker's estate (*i*).

8. A broker, authorised by several principals to deal on the Stock Exchange in the same security, includes all the orders in one contract with a jobber, according to the usage of the Stock Exchange (*k*). The broker becomes a defaulter before settling day, and his transactions are closed by the Official Assignee. Each of the principals may sue, or be sued in his own name by, the jobber in respect of the portion of the contract appropriated to him (*l*).

Article 97.

EFFECT ON RIGHT TO SUE THE PRINCIPAL, OF GIVING CREDIT TO OR OBTAINING JUDGMENT AGAINST THE AGENT.

Where an agent enters into a contract in such terms that he is personally liable thereon, and a judgment is obtained against him on the contract, the judgment, although unsatisfied, is, so long as it subsists, a bar to any proceedings against the principal on the contract (*m*).

Where an agent enters into a contract in such terms that he is personally liable thereon, and the other contracting party, knowing who is the real principal, elects to give exclusive credit to the agent, he is irrevocably bound by his election, and cannot afterwards charge the principal on the contract (*n*). Where such party, knowing who is the principal, sues and

(A) *Scott v. Ernest* (1900), 16 T. L. R. 498; *Levitt v. Hamblett*, [1901] 2 K. B. 53; 70 L. J. K. B. 520, C. A.; *Anderson v. Beard*, [1900] 2 Q. B. 260; 69 L. J. Q. B. 610. And see *Ponsolle v. Webber*, [1908] 1 Ch. 254; 77 L. J. Ch. 253; *Solloway v. Johnson*, [1934] A. C. 193; 103 L. J. P. C. 49, P. C.

(i) *Stoneham v. Wyman* (1901), 6 Com. Cas. 174.

(k) See Article 41, Illustration 10.

(l) *Scott v. Godfrey*, [1901] 2 K. B. 726; 70 L. J. K. B. 954; *Beckhuson v. Hamblett*, [1901] 2 K. B. 73; 70 L. J. K. B. 600, C. A.

(m) Illustrations 4 to 7.

(n) Illustrations 3, 7 and 11. *Smethurst v. Mitchell* (1859), 28 L. J. Q. B. 241; 1 El. & El. 623; *Thornton v. Meux* (1827), M. & M. 43; *Blaine v. Holland* (1889), 60 L. T. 285, P. C. As to the fiction whereby the assured is discharged from liability to the underwriters for premiums due in respect of policies of marine insurance, see *Universo Ins. Co. v. Merchants Ins. Co.*, [1897] 2 Q. B. 93; 66 L. J. Q. B. 564, C. A.

recovers judgment against the agent on the contract, he is conclusively deemed to have elected to give exclusive credit to the agent (o). Where he has not sued the agent to judgment, the question whether he has so elected or not is a question of fact, depending on the circumstances of the particular case (p).

Except as in this article provided, the liability of the principal, whether disclosed or undisclosed, upon a contract made on his behalf, is not affected by the facts that the agent is personally liable on the contract and that credit was given to him by the other contracting party (q).

Illustrations.

1. An agent buys goods in his own name, and the seller, not knowing that he is acting on behalf of a principal, or not knowing who the principal is, debits him with the price. The seller, on ascertaining who the principal is, may sue him for the price (r).

2. A broker buys goods in his own name, and does not mention the principal to the seller until after the broker has become insolvent. The principal is liable to the seller for the price, and has no right to set off a debt due to him from the broker (s).

3. An agent buys goods, and the seller, knowing at the time of the contract who the principal is, elects to give exclusive credit to the agent. The seller cannot subsequently charge the principal (t). So, a husband is not liable for the price of necessities ordered by his wife if exclusive credit were given to her (u).

4. An agent contracts in his own name, and judgment is recovered against him on the contract. The judgment, though unsatisfied, is a bar to an action against the principal on the contract (x).

5. An agent bought goods in his own name, and a judgment was obtained against him for the price. The seller then commenced an action against the principal, who raised the defence of *res judicata*, and obtained judgment. Subsequently, the judgment against the agent was set aside, and the seller then appealed from the decision in favour of the principal. It was held, on the appeal, that the judgment having been set aside, the principal was liable (y).

(o) Illustrations 6 and 7.

(p) Illustrations 8 to 11.

(q) Illustrations 1, 2, 7, 8 and 10. *Bottomley v. Nuttall* (1858), 28 L. J. C. P. 110; 5 C. B. (N.S.) 122; *Everett v. Collins* (1810), 2 Camp. 515; *Concordia, etc. v. Squire* (1876), 34 L. T. 824, C. A.; *Young v. White* (1912), 28 T. L. R. 87. And see Article 96, Illustration 6.

(r) *Thomson v. Davenport* (1829), 9 B. & C. 78; *Paterson v. Gandasequi* (1812), 15 East, 62; *Campbell v. Hicks* (1858), 28 L. J. Ex. 70.

(s) *Waring v. Favenck* (1807), 1 Camp. 85.

(t) *Addison v. Gandasequi* (1812), 4 Taunt. 574; *Paterson v. Gandesequi, supra*. There must be actual knowledge who the principal is: *Dunn v. Newton* (1884), 1 C. & E. 278.

(u) *Bentley v. Griffin* (1814), 5 Taunt. 356; *Metcalfe v. Shaw* (1811), 3 Camp. 22.

(z) *Priestley v. Fernie* (1865), 34 L. J. Ex. 172; 3 H. & C. 977; *Kendall v. Hamilton* (1879), 4 App. Cas. 504; 48 L. J. C. P. 705, H. L.; *R. M. K. R. M. v. M. R. M. V. L.*, [1926] A. C. 761; 95 L. J. P. C. 197, P. C.

(y) *Partington v. Hawthorne* (1888), 52 J. P. 807. But see *Cross v. Matthews* (1904), 91 L. T. 500.

6. An agent buys goods in his own name. The seller, after discovering who the principle is, sues the agent to judgment. The seller is conclusively deemed to have elected to look to the agent alone, and cannot subsequently charge the principal (z).

7. A husband and wife were sued jointly for the price of goods supplied to the wife, and judgment was entered against the wife, who in fact bought the goods as agent of her husband. It was held that, the plaintiff having elected to sue the parties jointly and recovered judgment against the wife, he was not entitled to recover against the husband as principal (a). So where, in a similar case, judgment was obtained against the wife for a portion of the amount claimed, it was held that the plaintiff was not entitled to recover against the husband in respect of the balance, the fact of signing judgment for part of the claim being an election to treat the wife as liable for the whole debt to the exclusion of the husband (b). But it is otherwise where judgment has been recovered against the wife in respect of severable items, in an amount claimed against her, upon the ground that she contracted as principal in respect of those items; and the husband may be sued in respect of the remaining items of the amount upon the ground that she contracted as his agent in relation to those items (c).

8. A broker bought cotton and gave the name of his principal, but inserted his own name as buyer, in the sold note. The seller invoiced the cotton to the broker, and called upon him to accept and pay for it, threatening legal proceedings. Held, in an action by the seller against the principal, that these facts did not necessarily amount to an election to give exclusive credit to the broker, and that the question whether the seller has so elected was one of fact (d).

9. A sells goods to an agent, and draws a bill upon him for the price, which the agent accepts. When the bill becomes due, A consents to renew it, adding interest, and again renews the second bill when it becomes due. The third bill is dishonoured, and the agent becomes bankrupt. The principal is liable to A for the price of the goods, unless A intended to give exclusive credit to the agent, and the fact of taking the acceptances is not conclusive proof of such an election (e).

10. A bought goods in his own name on behalf of B. The seller discovered that B was the principal, and subsequently, A having filed a liquidation petition, a clerk of the seller, for the purpose of proving in the liquidation, made an affidavit treating A as the debtor, and the affidavit was duly filed. Held, that the seller was not estopped by the affidavit from suing B for the

(z) *Priestley v. Fernie* (1865), 34 L. J. Ex. 172; 3 H. & C. 977; *Cross v. Matthews* (1904), 91 L. T. 500.

(a) *Morel v. Westmoreland*, [1904] A. C. 11; 73 L. J. Q. B. 93, H. L.; *Moore v. Flanagan*, [1920] 1 K. B. 919; 89 L. J. K. B. 417, C. A. See also *Rutherford v. Ounan*, [1913] 2 Ir. R. 265.

(b) *French v. Howie*, [1906] 2 K. B. 674; 75 L. J. K. B. 980, C. A.

(c) *Debenhams v. Perkins* (1925), 133 L. T. 252.

(d) *Calder v. Dobell* (1871), L. R. 6 C. P. 486; 40 L. J. C. P. 224, Ex. Ch.; *Mortimer v. M'Callan* (1840), 6 M. & W. 58.

(e) *Robinson v. Read* (1829), 9 B. & C. 449; *Whitwell v. Perrin* (1858), 4 C. B. (N.S.) 412; *Reed v. White* (1804), 5 Esp. 122; *Tempest v. Ord* (1815), 1 Madd. 89; *The Huntsman*, [1894] P. 214; *Marsh v. Pedder* (1815), 4 Camp. 257.

price of the goods (*f*). No proceedings, short of suing the agent to judgment, are conclusive proof in point of law of an election to credit the agent exclusively; but such an act as proving for the debt against the agent's estate in bankruptcy after the principal becomes known is, of course, strong evidence of such an election (*f*).

11. A & Co., who were the managing owners of several ships belonging to different principals, instructed insurance brokers to effect policies on the ships, and accepted bills drawn by the brokers for premiums paid by them, and it was agreed that if any acceptance should be dishonoured, the brokers should be entitled to cancel policies in whole or in part, and apply the return premiums towards payment of A & Co.'s indebtedness. A & Co. having become bankrupt, the brokers sued the owners of one of the ships for premiums. Held, that the brokers had elected to take A & Co. as their sole debtors (*g*).

Article 98.

SETTLEMENT BETWEEN PRINCIPAL AND AGENT AFFECTING RECOURSE TO PRINCIPAL.

Where a debt or obligation has been contracted through an agent, and the principal is induced by the conduct of the creditor reasonably to believe that the agent has paid the debt or discharged the obligation, or that the creditor has elected to look to the agent alone for the payment or discharge thereof, and in consequence of such belief pays, or settles or otherwise deals to his prejudice with, the agent, the creditor is not permitted to deny, as between himself and the principal, that the debt has been paid or the obligation discharged, or that he has elected to give exclusive credit to the agent so as to discharge the principal (*h*); but mere delay by the creditor in enforcing his claim, or in making application to the principal for payment of the debt or discharge of the obligation, is not sufficient inducement for this purpose, unless there are special circumstances rendering the delay misleading (*i*).

Where an agent buys goods in his own name from a seller who believes him to be buying on his own account, and, whilst the seller continues to give exclusive credit to the agent,

(*f*) *Curtis v. Williamson* (1874), L. R. 10 Q. B. 57; 44 L. J. Q. B. 27; *Morgan v. Couchman* (1853), 23 L. J. C. P. 36; 14 C. B. 100; *Taylor v. Sheppard* (1836), 1 Y. & Coll. 271; *Fell v. Parkin* (1882), 52 L. J. Q. B. 99; *MacClure v. Schemmil* (1871), 20 W. R. 168.

(*g*) *Lamont v. Hamilton*, [1907] S. C. 628, Sc.

(*h*) Illustrations 1 to 4. *Horsfall v. Fauntleroy* (1830), 10 B. & C. 755. The principle is that of estoppel by conduct.

(*i*) Illustration 5. *Davison v. Donaldson* (1882), 9 Q. B. D. 623, C. A. In this case the principal was held not to be discharged by a settlement with his agent, though the creditor made no application to the principal until three years after the debt was contracted, the agent having in the meantime become bankrupt. Comp. *Smethurst v. Mitchell* (1859), 1 El. & El. 623; 28 L. J. Q. B. 241; *Fell v. Parkin* (1882), 52 L. J. Q. B. 99.

believing him to be the principal and not knowing of any other person in the transaction, the principal in good faith pays the agent for the goods, the principal is discharged from liability to the seller (*k*).

Except as in this article provided, the principal, whether disclosed or undisclosed, is not discharged, nor is the right of recourse to him affected, by the circumstance that he has paid or settled or otherwise dealt to his prejudice with the agent (*l*).

Illustrations.

1. A creditor takes a security from the agent of his debtor, and gives the agent a receipt for the debt. The principal deals to his detriment with the agent on the faith of the receipt. The principal is discharged from liability to the creditor (*m*).

2. An agent of a debtor offers to pay the debt either in cash or by a bill of exchange. The creditor takes a bill in payment, and it is dishonoured. If the agent had funds of the principal's wherewith to pay the debt, or if the principal deal to his prejudice with the agent on the faith of his having paid it, the principal is discharged from liability to the creditor (*n*).

3. Goods were sold, on the terms that they should be paid for in cash, to an agent who appeared to be buying on his own account. The seller omitted to enforce cash payment, and the principal, not knowing that the seller had not been paid, paid the agent for the goods. Held, that the principal was discharged (*o*).

4. The agent of a debtor paid the debt by means of his own cheque, and the creditor neglected to present the cheque for four weeks, when it was dishonoured, and the agent absconded. There was a reasonable chance that the cheque would have been honoured if it had been presented within three weeks, and the principal had dealt to his detriment with the agent on the faith of the payment. Held, that the principal was discharged (*p*).

5. A employed a broker to buy oil. The broker bought from B, telling him that he was acting for a principal, the terms being that the oil should be paid for by "cash on or before delivery." B delivered the oil without payment, and A, not knowing that B had not been paid, in good faith paid the broker.

(*k*) *Armstrong v. Stokes* (1872), L. R. 7 Q. B. 598; 41 L. J. Q. B. 253. This case must be treated as still being law, because it has not been definitely overruled. It is, however, of very doubtful authority, and certainly will not be in the least extended. See *per Brett, L.J.*, in *Irvine v. Watson* (1880), 5 Q. B. D. 414; 49 L. J. Q. B. 531. The decision was expressly confined to the circumstances of the particular case, and was not founded on any general principle.

(*l*) Illustration 5. *Heald v. Kenworthy* (1855), 10 Ex. 739; 24 L. J. Ex. 76; *Dent v. Dunn* (1812), 3 Camp. 296; *Nelson v. Powell* (1784), 3 Doug. 410; *Macfarlane v. Giannacopulo* (1858), 3 H. & N. 850; *Pratt v. Willey* (1826), 2 C. & P. 350. And see Article 98, Illustrations 6 and 7.

(*m*) *Wyatt v. Hertford* (1802), 3 East, 147; *Smyth v. Anderson* (1849), 7 C. B. 21; 18 L. J. C. P. 109.

(*n*) *Smith v. Ferrand* (1827), 7 B. & C. 19. Comp. cases cited under Article 97. Illustration 9.

(*o*) *MacClure v. Schemeil* (1871), 20 W. R. 168. Comp. *Kymer v. Suwercropp* (1807). Camp. 109. Illustration 5.

(*p*) *Hopkins v. Ware* (1869), L. R. 4 Ex. 268; 39 L. J. Ex. 147.

The broker soon afterwards became insolvent, and B sued A for the price of the oil. It was proved that it was not the invariable custom in the oil trade to insist on prepayment in the case of a sale for "cash on or before delivery." Held, that, in the absence of such an invariable custom, the mere omission to insist on prepayment was not such conduct as would reasonably induce A to believe that the broker had paid for the oil, and that, therefore, A was liable to B for the price (q).

Article 99.

FRAUD, MISREPRESENTATION, OR KNOWLEDGE OF AGENT MAY BE SET UP IN AN ACTION BY THE PRINCIPAL.

Where a principal seeks to enforce a contract negotiated or made by his agent, the fraud, misrepresentation, non-disclosure, or knowledge of either the principal or the agent may be set up by the other contracting party by way of defence, in the same manner, and with the same effect, as the fraud, misrepresentation, non-disclosure, or knowledge of the principal might have been if he had himself negotiated or made the contract (r).

Illustrations.

1. A person is induced by the material misrepresentations of the directors to contract to take shares in a company. He is entitled to have the contract rescinded, and his name removed from the register of shareholders, and to be repaid the amount paid for the shares (s), provided he take steps for that purpose immediately he discovers the falsity of the representations, and before the commencement of the winding-up of the company (t). So, if a person be induced by the misrepresentations of an insurance agent to effect a policy, the insurance company is not entitled to retain the benefit of the contract, though it did not authorise the misrepresentations (u).

(q) *Irvine v. Watson* (1880), 5 Q. B. D. 102, 414; 49 L. J. Q. B. 239, 531, C. A.; *Davison v. Donaldson* (1882), 9 Q. B. D. 623, C. A.

(r) See Illustrations. *Raphael v. Goodnan* (1838), 8 A. & E. 565; *Foster v. Green* (1862), 7 H. & N. 881; *Whurr v. Devenish* (1904), 20 T. L. R. 385; and see p. 212, *post*.

(s) *Reese River Mining Co. v. Smith* (1869), L. R. 4 H. L. 64; 39 L. J. Ch. 849; *Wainwright's case* (1890), 6 T. L. R. 413, C. A.; *Western Bank of Scotland v. Addie* (1867), L. R. 1 H. L. (Sc.) 145, H. L. See also *Hilo Manufacturing Co. v. Williamson* (1912), 28 T. L. R. 164, C. A.

(t) *Onkes v. Turquand* (1867), L. R. 2 H. L. 325; 36 L. J. Ch. 949, H. L.; *Ogilvie v. Currie* (1868), 37 L. J. Ch. 541; *Stone v. City and County Bank* (1877), 47 L. J. C. P. 681; 3 C. P. D. 282, C. A.; *Pawle's case* (1869), L. R. 4 Ch. 497; 38 L. J. Ch. 412; *Tennent v. Glasgow Bank* (1879), 4 App. Cas. 615, H. L.; *Burgess's case* (1880), 15 Ch. D. 507; 49 L. J. Ch. 541. *Comp. Re International Socy. of Auctioneers, Baillie's case*, [1898] 1 Ch. 110; 67 L. J. Ch. 81. Rescission of the contract is, apparently, the only remedy against the company. A person induced by misrepresentations to become a member of a company cannot, at all events after the commencement of the winding-up of the company, while he is still a member, maintain an action against the company for damages for the misrepresentations, even if they were made fraudulently: *Houldsworth v. Glasgow Bank* (1880), 5 App. Cas. 317, H. L.

(u) *Refuge Assurance Co. v. Kettlewell*, [1909] A. C. 243; 78 L. J. K. B. 519, H. L.; *Hughes v. Liverpool, etc., Socy.*, [1916] 2 K. B. 482; 85 L. J. K. B. 1643, C. A.

2. An agent who was employed to find a purchaser for certain property misrepresented certain facts bearing on the value of the property. Specific performance was refused (*x*). So, where an agent, in negotiating for the purchase of property, falsely denied that he was buying it on behalf of a certain person, with the knowledge that if he disclosed the fact the other party would not enter into the contract, the Court refused to decree specific performance (*y*). But where the personal qualification of the real purchaser is immaterial, non-disclosure of his identity will not form a ground of defence to specific performance (*z*).

3. A local agent of a bank lends money to an executor, who mortgages property of the testator to the banker as security for repayment. The executor, to the knowledge of the agent, intended to and does misapply the money. The mortgage is invalid, and the banker has no claim against the estate of the testator (*a*).

4. A, knowing that his sheep are diseased, employs an agent to sell them, and conceals their condition from him, intending him to sell them as sound. The agent, believing the sheep to be sound, so represents them to the purchaser. The contract is voidable, on the ground of the principal's fraud (*b*).

5. A instructed B to re-insure an overdue ship at a certain rate. B was unable to obtain the rate mentioned, but received a quotation at a higher rate from C. B then heard that the vessel was lost, and wired in A's name to C to insure at the higher rate. Subsequent negotiations took place between A and C, and ultimately C re-insured the vessel at a higher rate than that originally quoted by him. The jury found that the insurance was effected through B's agency. Held, that A could not recover on the policy, because B had not disclosed to C the fact that he had heard of the loss of the ship (*c*).

6. An agent sent notes to his principal by carrier, and they were lost in transit. The carrier had given notice to the principal that he would not be liable for the loss of notes, but had not given any such notice to the agent. An action being brought by the principal in respect of the loss of the notes, it was held that the carrier was not liable (*d*).

7. A partner sold goods which were packed, to his knowledge, for the purpose of smuggling. Held, that the firm were not entitled to recover the price of the goods, though the other partners were not aware of the illegal nature of the transaction (*e*).

(*x*) *Mullens v. Miller* (1882), 22 Ch. D. 194; 52 L. J. Ch. 380; *Myers v. Watson* (1851), 1 Sim. (n.s.) 523; *Wilde v. Gibson* (1848), 1 H. L. Cas. 605; *Winch v. Winchester* (1812), 1 V. & B. 375.

(*y*) *Archer v. Stone* (1898), 78 L. T. 34; *Whurr v. Devenish* (1904), 20 T. L. R. 385.

(*z*) *Nash v. Dix* (1898), 78 L. T. 445; *Dyster v. Randall*, [1926] Ch. 932; 95 L. J. Ch. 504.

(*a*) *Collinson v. Lister* (1855), 7 De G. M. & G. 634.

(*b*) *Ludgater v. Love* (1881) 44 L. T. 694, C. A.; *Stevens v. Legh* (1853), 2 C. L. R. 251; and see p. 212, *post*.

(*c*) *Blackburn v. Haslam* (1888), 21 Q. B. D. 144; 57 L. J. Q. B. 479; *Morrison v. Universal Ins. Co.* (1873), L. R. 8 Ex. 197; 42 L. J. Ex. 115, Ex. Ch. But it is not necessary to disclose information acquired after the slip has been signed by the underwriters: *Cory v. Patton* (1874), L. R. 9 Q. B. 577; 43 L. J. Q. B. 181.

(*d*) *Mayhew v. Eames* (1825), 3 B. & C. 601. See also *Bartlett v. Purnell* (1836), 4 A. & E. 792.

(*e*) *Biggs v. Lawrence* (1789), 3 T. R. 454

8. An agent of a firm of printers contracted with A for the printing of copies of a manuscript which, to the knowledge of both A and the agent, contained libellous matter. Held, that the printers were not entitled to recover the cost of work done under the contract, although they had no actual notice of the libellous nature of the manuscript, the knowledge of the agent being equivalent to their knowledge (*f*).

Article 100.

SETTLEMENT WITH, OR SET-OFF AGAINST, AGENT AFFECTING RIGHTS OF PRINCIPAL.

Every person who, in dealing with an agent, is led by the conduct of the principal to believe, and does in fact believe, that the agent is the principal in the transaction, is discharged from liability by payment to or settlement with the agent in any manner which would have operated as a discharge if the agent had been the principal (*g*), and is entitled, as against the principal, to the same right of set-off in respect of any debt due from the agent personally as he would have been entitled to if the agent had been the principal (*h*); provided that he had not, at the time when the payment or settlement took place, or the set-off accrued, received actual notice that the agent was not in fact the principal (*i*).

Where a principal permits his agent to have the possession of goods, or of the documents of title thereto, he is deemed, for the purposes of this article, by his conduct to hold out the agent as the owner of the goods (*k*).

Where an agent, being duly authorised in that behalf, contracts in his own name in respect of goods upon which he has a lien as against the principal, the right of the principal to sue on the contract, during the time that the claim secured by the lien remains unsatisfied, is subservient to that of the agent; and a payment to or settlement with the agent during that time operates as a discharge, notwithstanding that the person making the payment or settlement has had notice from the principal or his trustee in bankruptcy not to pay or settle with the agent (*l*); and such payment or settlement may, to the extent of the claim secured by the lien of the agent, be by way of set-off or settlement of accounts between the agent and the person making the payment or settlement (*l*).

(*f*) *Apthorp v. Neville* (1907), 23 T. L. R. 575.

(*g*) Illustration 1. *Curlewis v. Birkbeck* (1863), 3 F. & F. 894. And see *Favenc v. Bennett* (1809), 11 East, 36; *Blackburn v. Scholes* (1810), 2 Camp. 343.

(*h*) Illustrations 2, 5 and 7.

(*i*) Illustrations 8 and 9. *Ex p. Dixon, re Henley* (1876), 4 Ch. D. 133; 46 L. J. Bkcy. 20, C. A. Constructive notice is not enough: *Greer v. Downs Supply Co.*, [1927] 2 K. B. 28; 96 L. J. K. B. 534, C. A.; *Manchester Trust v. Furness, Manchester Trust v. Turner*, [1895] 2 Q. B. 539; 64 L. J. Q. B. 766, C. A.

(*k*) Illustration 2.

(*l*) Illustrations 10 and 11.

Except as in this article provided, the defendant, in an action by the principal, has no right to set-off any claim he may have against the agent personally (*m*); and the principal is not bound by a payment to, or settlement with, the agent, unless such payment or settlement was made in the ordinary course of business, and in a manner actually or apparently authorised by him (*n*). Notwithstanding any special custom or usage, it is not deemed to be within the apparent scope of the authority of any agent to receive payment on his principal's behalf by way of set-off or settlement of accounts between himself and the person making the payment (*o*).

Illustrations.

1. A, the owner of certain goods, permits B to hold himself out as the owner thereof. B holds himself out as the owner to C, and C, believing him to be the owner, receives the goods in part payment of a debt owing by B. C is not hable to A for the price of the goods (*p*). If an owner of goods permit his agent to sell them as principal, the buyer is discharged by payment to the agent in any way which would have operated to discharge him if the agent had been the true owner (*q*).

Right of Set-off.

2. A factor sells goods in his own name, the buyer dealing with him as principal, and believing him to be selling his own goods. The buyer, in an action by the principal for the price of the goods, has a right to set off a debt due to him from the factor personally, provided that the debt was incurred before he had received notice that the goods did not belong to the factor (*r*).

3. A factor sells goods in his own name, the buyer knowing that he is selling them as factor, but not knowing who is the principal. The principal sues the buyer for the price. The buyer has no right to set off a debt due to him from the factor (*s*). The circumstance that the factor sells under a *del credere* commission does not affect this rule (*t*).

(*m*) Illustrations 3 to 9. *Young v. White* (1844), 13 L. J. Ch. 418; 7 Beav. 506; *Gordon v. Ellis* (1846), 15 L. J. C. P. 178; 2 C. B. 821; *Richardson v. Stormont*, [1900] 1 Q. B. 701; 69 L. J. Q. B. 369, C. A.; *Wester Moffat Colliery Co. v. Jeffrey*, [1911] S. C. 346.

(*n*) Illustrations 12 to 17. *Campbell v. Hassal* (1816), 1 Stark. 233; *Kaye v. Brett* (1850), 19 L. J. Ex. 346; 5 Ex. 269; *Mann v. Forrester* (1814), 4 Camp. 60; *Drakeford v. Piercy* (1866), 7 B. & S. 515; *Hughes v. Morris* (1852), 9 Hare, 636; *Townsend v. Inglis* (1816), Holt, 278; *Dunlop v. De Murrieta* (1886), 3 T. L. R. 166, C. A.; *Butwick v. Grant*, [1924] 2 K. B. 483; 93 L. J. K. B. 972.

(*o*) See Article 35, Illustrations 7 and 8; Article 39. *Russell v. Bangley* (1821), 4 B. & A. 305.

(*p*) *Ramazotti v. Bowring* (1859), 29 L. J. C. P. 30; 7 C. B. (N. S.) 851.

(*q*) *Coates v. Lewes* (1808), 1 Camp. 444.

(*r*) *Borries v. Imperial Ottoman Bank* (1873), L. R. 9 C. P. 38; 43 L. J. C. P. 3; *Carr v. Hinchliff* (1825), 4 B. & C. 547; *Rabone v. Williams* (1785), 7 T. R. 360; *Baring v. Corrie* (1818), 2 B. & A. 137; *George v. Clagett* (1797), 7 T. R. 359; *Ex p. Dixon, re Henley* (1876), 4 Ch. D. 133; 46 L. J. Bkcy. 20, C. A.

(*s*) *Semenza v. Brinsley* (1865), 34 L. J. C. P. 161; 18 C. B. (N. S.) 467; *Moor v. Clementson* (1809), 2 Camp. 22; *Fish v. Kempton* (1849), 18 L. J. C. P. 206; 7 C. B. 687; *Cooper v. Strauss* (1898), 14 T. L. R. 233.

(*t*) *Hornby v. Lacy* (1817), 6 M. & S. 166.

4. A broker bought goods on behalf of A from a factor who sold them on behalf of B. The broker knew that the factor sold the goods on behalf of a principal, but A thought that he was selling his own goods. B sued A for the price. Held, that A was bound by the knowledge of his broker, and therefore had no right to set off a debt due to him from the factor (u).

5. A broker, who was intrusted by his principal with the possession of goods, sold them in his own name without disclosing the principal. The buyer knew that the broker sometimes sold goods in his own name, though acting as a broker, and sometimes sold goods of his own, and in this case had no particular belief one way or the other. Held, that the buyer was not entitled, in an action by the principal for the price, to set off a debt due from the broker personally (x). The right to set off, as against the principal, a debt due from the agent, is founded upon estoppel, and the buyer must show that he was led by the conduct of the principal to believe, and did in fact believe, that the agent was acting as principal (z).

6. An agent, with consent of the owner, sold goods as principal. The agent afterwards became bankrupt, and the principal sued the buyer for non-acceptance of the goods. Held, that the defendant was not entitled to set up, by way of defence, that there were mutual credits between the agent and himself resulting in a balance in his favour, because the mutual credits clause of the Bankruptcy Act applies only as between the bankrupt and his creditors (y). In order to constitute a right of set-off as against the principal, each of the debts must be liquidated (y).

7. A employed B to collect general average contributions under an insurance policy. B instructed a broker to collect the contributions, the broker believing him to be the principal. B became bankrupt. In an action by A against the broker for the contributions, as money received to his use, it was held that the broker was entitled to set off a debt due from B (z).

8. A, who acted as shipping agent for B, a merchant in Havannah, consigned in his own name to C a cargo of tobacco. C, according to his instructions, insured the cargo for the benefit of all concerned, having had notice that there was a principal. The cargo was lost, and the insurance money was paid to C after he had received notice that B claimed it. Held, that C was not entitled to set off, as against B, debts due to him from A personally (a).

9. Goods were consigned to an agent for sale. The agent pledged the goods to brokers as security for a specific advance, and authorised them to sell. The brokers sold the goods, but before receiving the proceeds had notice that the principal was the owner, and that he claimed the proceeds. Held, that the principal was entitled to the balance of the proceeds after deducting the amount of the advance, and that the brokers were not entitled

(u) *Dresser v. Norwood* (1864), 34 L. J. C. P. 48; 17 C. B. (N.S.) 466, Ex. Ch.

(x) *Cooke v. Eshelby* (1887), 12 App. Cas. 271; 56 L. J. Q. B. 505, H. L.; *Baring v. Corrie* (1818), 2 B. & A. 137.

(y) *Turner v. Thomas* (1871), L. R. 6 C. P. 610; 40 L. J. C. P. 271. See Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 31.

(z) *Montagu v. Forwood*, [1893] 2 Q. B. 350, C. A.

(a) *Mildred v. Maspons* (1883), 8 App. Cas. 874; 53 L. J. Q. B. 33, H. L.

to set off such balance against a general account due to them from the agent (c). Otherwise, if they had received the proceeds in the *bona fide* belief that they belonged to the agent, and had credited the amount in the account with the agent before receiving notice of the principal's claim (d).

Where the Agent has a Lien.

10. A factor, who has a lien on goods for advances, sells the goods in his own name. The buyer, though he knew that the factor was acting as an agent, is, to the extent of the factor's lien, discharged by a payment to him, even if the payment be by way of set-off (e), or be made after the bankruptcy of the principal, and after notice from the trustee in bankruptcy not to pay the factor (f).

11. A factor, who had a lien on goods in excess of their value, sold the goods to A, to whom he was indebted. The factor became bankrupt. A gave credit for the price of the goods, and proved in the bankruptcy for the residue of his debts against the factor. Held, that this settlement was a good answer to an action by the principal against A for the price (g).

12. A broker sells goods in the name of his principal to A, who pays the broker for them. The broker absconds without paying over the money to the principal. A is liable to the principal for the price of the goods, unless the broker had authority, or was held out by the principal as having authority, to receive payment, and the mere fact that the principal had on previous occasions authorised him to receive payment for goods sold on his behalf is not sufficient evidence of such authority or holding out (h).

Payment to or Settlement with Agent.

13. A power of attorney to sell stock was given through a country stock-broker to his London agent. The agent sold the stock, and settled with the country broker, who was not authorised to receive payment. The principal did not receive any part of the money. Held, that the principal was not bound by the settlement with the broker, and that the London agent was liable to him for the proceeds of the stock (i).

14. An auctioneer sold goods by auction, the conditions providing that the deposit should be paid to him at once, and the balance of the purchase-money on or before delivery. The purchaser duly paid the deposit, and on delivery of the goods gave the auctioneer a bill of exchange for the balance. Before the bill matured, the principal revoked the auctioneer's authority to receive payment, and gave notice of the revocation to the purchaser. Held, that the purchaser was not discharged by the payment to the auctioneer, it not being shown that he was authorised, or that it was customary, to take bills

(c) *Kallenbach v. Lewis* (1885), 10 App. Cas. 617; 55 L. J. Ch. 58, H. L.

(d) *Ibid.*; *New Zealand and Australian Land Co. v. Watson* (1881), 7 Q. B. D. 374; 50 L. J. Q. B. 433, C. A.

(e) *Warner v. M'Kay* (1836), 1 M. & W. 591. This case was decided independently of the question of the extent of the factor's lien, and it now appears to be good law only to the extent stated in the text: *ante*, Illustration 5.

(f) *Drinkwater v. Goodwin* (1775), Cowp. 251.

(g) *Hudson v. Granger* (1821), 5 B. & A. 27.

(h) *Linck v. Jameson* (1886), 2 T. L. R. 206, C. A.

(i) *Crosley v. Magniac*, [1893] 1 Ch. 594.

of exchange in payment (*k*). A payment to an agent who is known to be such must be in cash in order to bind the principal, unless he authorised the agent, or held him out as having authority, to receive payment in some other form (*l*). But a custom in a particular business to receive payment by cheque is reasonable and binding (*m*).

15. A was a traveller for a firm to whom B was indebted, and had authority to collect debts due to the firm. The firm wrote a letter to A, saying: "We should like to draw for the amount." A showed the letter to B, who thereupon accepted a bill drawn in blank, and payable to "my order." A afterwards filled in his own name as drawer, and misappropriated the proceeds of the bill. Held, that the firm were not bound by the payment (*n*).

16. An agent is authorised to sell certain goods and receive payment. He sells the goods, and the buyer, knowing that he is acting as an agent, pays him before the credit has expired, deducting discount. The agent does not pay over the money to the principal, and becomes bankrupt before payment is due. The principal is not bound by the payment, unless it be shown that it is customary in the ordinary course of the particular business to make payments before they are due, or that the agent had authority to receive payment otherwise than in accordance with the terms of the contract (*o*).

17. An insurance broker, being authorised to settle and receive payment of a claim under a policy, takes a bill of exchange from the insurer in payment of a general account, including the claim in question, and subsequently discounts the bill, which is duly paid by the insurer. The broker fails without having paid his principal. The principal is not bound by the payment to the broker, it being contrary to the usual custom for an insurance broker to receive payment by a bill of exchange (*p*).

Sect. 3.—*Liability of the Principal for Wrongs of Agent.*

Article 101.

CROWN NOT LIABLE FOR WRONGS OF PUBLIC AGENTS.

There is no remedy against the Crown, by petition of right or otherwise, for any wrongful act or omission of a public agent (*q*).

(*k*) *Williams v. Evans* (1866), L. R. 1 Q. B. 352; 35 L. J. Q. B. 111.

(*l*) *Sykes v. Giles* (1839), 5 M. & W. 645; 9 L. J. Ex. 106; *Barker v. Greenwood* (1836), 2 Y. & C. 414; *Coupé v. Collyer* (1890), 62 L. T. 927; Article 32. Illustrations 4 to 8. *Comp. Anderson v. Hillies* (1852), 21 L. J. C. P. 150; 12 C. B. 490.

(*m*) *Bridges v. Garrett* (1870), L. R. 5 C. P. 451; 39 L. J. C. P. 251, Ex. Ch. Such a custom must be proved.

(*n*) *Hogarth v. Wherley* (1875), L. R. 10 C. P. 630; 44 L. J. C. P. 330. *Comp. International Sponge Importers v. Watt*, [1911] A. C. 279; 81 L. J. P. C. 12, H. L.

(*o*) *Catterall v. Hindle* (1867), L. R. 2 C. P. 368, Ex. Ch.; *Heisch v. Carrington* (1833), 5 C. & P. 471; *Breming v. Mackie* (1862), 3 F. & F. 197.

(*p*) *Hine v. S.S. Ins. Syndicate* (1895), 72 L. T. 79, C. A.

(*q*) *Tobin v. R.* (1864), 33 L. J. C. P. 199; 16 C. B. (N.S.) 310; *Feather v. R.* (1865), 35 L. J. Q. B. 200; 6 B. & S. 257; *Canterbury v. At.-Gen.* (1842), 12 L. J. Ch. 281; 1 Ph. 306. A servant of the Crown is not responsible for the wrongs of his subordinates: *Fraser v. Balfour* (1918), 87 L. J. K. B. 1116; unless done in obedience to his direct orders: *Raleigh v. Goschen*, [1898] 1 Ch. 73; 67 L. J. Ch. 59.

Article 102.

WRONGS COMMITTED BY AGENT ACTING WITHIN SCOPE OF AUTHORITY.

Where injury or loss is caused to a third person by the wrongful act or omission of an agent who is acting within the scope of his authority, the principal is liable jointly and severally with the agent (*r*).

An agent acts within the scope of his authority when he acts by express or implied authority of his principal (*s*) or in the course of his employment as a servant (*t*).

Where the agent is acting in the course of his employment as a servant, the principal is liable although the agent, as between himself and the principal, has no authority to do the particular act and the act is done for the benefit of the agent and not of the principal (*u*).

Illustrations.

"If A suffers damage by the wrongful act of B, and seeks to say that C is liable for that damage, he must establish that in doing the act B acted as the agent or servant of C. If he says that he was C's agent, he must further show that C authorised the Act. If he can establish that B was the servant of C the question of authority need not arise. A master is jointly and severally liable with his servant for any tort committed by the servant in the course of his employment" (*x*).

1. A, being hired to sing at a music-hall, and being permitted to choose his own song, sang a song infringing B's copyright. No control was exercised by the proprietor of the music-hall to prevent infringement of copyright. Held, that there was sufficient evidence for the jury of authority to sing the song complained of to render the proprietor liable in an action by B for the infringement (*y*).

2. A, the chairman at a meeting, at the request of B, who took part in the meeting, made a defamatory statement concerning C, and both A and B expressed a desire that the reporters present would take notice of the case. Correct reports having been published, it was held, in an action by C for libel, that there was evidence for the jury of publication by A and B through the reporters, whom they had made their agents (*z*).

(*r*) See Illustrations. As to the effect of judgment against one of them, and as to contribution, see Article 107. As to the immunity of trade unions, see Article 106. As to corporations, see Article 105.

(*s*) Illustrations 1—5. *Glynn v. Houston* (1841), 2 M. & G. 337; *Robinson v. Vaughan* (1838), 8 C. & P. 252; *Schuster v. McKellar* (1857), 7 E. & B. 704; 26 L. J. Q. B. 281.

(*t*) Illustrations 6—27.

(*u*) Illustration 26.

(*z*) *MacKinnon, L.J.*, in *Hewitt v. Bouvin*, [1940] 1 K. B. 188, at p. 191; 109 L. J. K. B. 223, C. A. See the luminous discussion of this subject in *Salmond on Torts* (9th ed.), pp. 36 *et seq.* As to the liability of a firm for the wrongful acts or omissions of a partner, see Article 8.

(*y*) *Monaghan v. Taylor* (1886), 2 T. L. R. 685.

(*z*) *Parkes v. Prescott* (1869), L. R. 4 Ex. 169; 38 L. J. Ex. 105. Comp. *Lucas v. Mason* (1875), L. R. 10 Ex. 251; 44 L. J. Ex. 145.

3. A the owner of a motor car, while riding in the car with B, allows B to drive. B causes injury by negligent driving. Unless it can be shown that A has abandoned control, he is liable for the injury (a). So, where A, the owner, permitted B to drive when A's driver was riding in the car with B (b). So, where the owner permitted another to drive the car, without abandoning the right of control, although neither the owner nor his servant was in the car (c). Otherwise, where the right of control is abandoned (d). The question, in such cases, is whether, according to the permission given and the circumstances of the case, the driver is driving, on his own behalf, a car which is bailed to him, or is driving, on behalf of the owner, or under delegation of the task of driving (e).

Where a commission agent used his own car for the purpose of getting orders for goods of his principal, it was held that the principal was not liable for damage caused by negligent driving of the agent, who was not the servant or agent of the principal for the purpose of driving the car (f). If it be shown that a servant has authority to drive for some purposes, the burden of proof may be shifted to the master to show that the servant was acting outside the scope of his employment (g).

4. A the landlord of a shop, which was let to B, entered the shop with C, whom he invited to assist in searching for an escape of gas. C negligently caused an explosion, which damaged the goods of B on the premises. Held, that A was responsible for the negligence of C, his agent (h).

5. A master ordered his servant to lay rubbish near a neighbour's wall, but so as not to touch the wall. The rubbish ran against the wall. Held, that the master was liable for the trespass (i). Otherwise, if the servant lay the rubbish in a place which the master has forbidden (k).

6. A principal is liable for infringement by his agent, acting in the course of his employment, of a patent (l), trade mark (m), or copyright (n).

7. A landlord is liable for wrongful distress committed by a bailiff, acting on the landlord's behalf, and within the scope of the bailiff's employment (o).

(a) *Samson v. Aitchison*, [1912] A. C. 844; 82 L. J. P. C. 1, P. C.; *Pratt v. Patrick*, [1924] 1 K. B. 488; 93 L. J. K. B. 174; *Wheatley v. Patrick* (1837), 2 M. & W. 650; 6 L. J. Ex. 193.

(b) *Reichardt v. Shard* (1914), 31 T. L. R. 24, C. A.

(c) *Parker v. Miller* (1926), 42 T. L. R. 408, C. A.

(d) *Britt v. Galmoye* (1928), 44 T. L. R. 294.

(e) *See Hewitt v. Bouvin*, [1940] 1 K. B. 188; 109 L. J. K. B. 223, C. A.

(f) *Egginton v. Reader* (1936), 52 T. L. R. 212.

(g) *Laycock v. Grayson* (1939), 55 T. L. R. 698.

(h) *Brooke v. Bool*, [1928] 2 K. B. 578; 97 L. J. K. B. 511.

(i) *Gregory v. Piper* (1829), 9 B. & C. 591; *Goh Choon Seng v. Nee Kim Soo*, [1925] A. C. 550; 95 L. J. P. C. 129, P. C.

(k) *Rand (or Rank) v. Craig*, [1919] 1 Ch. 1; 88 L. J. Ch. 45, C. A.; see also *Bolinbroke v. Swindon* (1874), L. R. 9 C. P. 575; 43 L. J. C. P. 287.

(l) *Betta v. De Vitre* (1868), L. R. 3 Ch. 429; 37 L. J. Ch. 325.

(m) *Tonge v. Ward* (1869), 21 L. T. 480.

(n) Illustration 1.

(o) *Hurry v. Rickman* (1831), 1 M. & Rob. 126; *Smith v. Goodwin* (1833), 2 L. J. K. B. 192; 4 B. & Ad. 413; *Freeman v. Rosher* (1849), 13 Q. B. 780; 18 L. J. K. B. 340; *Haich v. Hale* (1850), 15 Q. B. 10; 19 L. J. Q. B. 289; *Gauntlett v. King* (1857), 3 C. B. (N.S.) 59; *Haseler v. Lemoyne* (1858), 5 C. B. (N.S.) 530; 28 L. J. C. P. 103.

But he is not liable for an unauthorised assault committed by the bailiff in levying a distress (*p*).

8. The owners and master of a ship are responsible for damage caused by the negligent navigation of a pilot (*q*).

9. Where a solicitor, by indorsement upon a writ of execution, directs the sheriff to seize the goods of the wrong party, the client is liable, it being the solicitor's duty to indorse the writ (*r*). So, if the solicitor issue execution after the debt has been paid (*s*). But a solicitor has no implied authority to direct the sheriff to seize particular chattels (*t*).

10. A clerk, without the authority of his master, used his master's lavatory and negligently left the tap running. Held, that the master was not liable for the damage done (*u*). Otherwise, if the clerk had permission to use the lavatory (*x*).

11. Where a carman left a coal-shoot open in the highway, his master was held liable for injury resulting therefrom (*y*).

12. A sent a barge under the management of his lighterman to be loaded at a wharf. The foreman at the wharf directed the lighterman to move another barge out of his way, and the lighterman did so, causing damage to such other barge. Held, that A was liable to make good the damage (*z*).

13. A harbour master gave the master of a ship permission to use a certain lock for the purpose of clearing the propeller, representing that the lock was level, and that the ship might safely ground there, other vessels having on previous occasions been grounded in the same lock under similar circumstances. The ship was damaged by a sill projecting several inches above the level across the middle of the lock. Held, that the harbour master was acting within the scope of his authority in giving permission to use the lock, and in representing that the ship might safely ground, and that the owners of the dock were liable for the injury (*a*).

(*p*) *Richards v. West Middlesex Waterworks Co.* (1885), 15 Q. B. D. 660; 54 L. J. Q. B. 551; and see *Radley v. L. C. C.* (1913), 109 L. T. 162.

(*q*) Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31), s. 15, abolishing the defence of compulsory pilotage: *The Chyebassa*, [1919] P. 201; 88 L. J. P. 191. The Act extends to the United Kingdom and the Isle of Man and applies to all ships, British and foreign. The defence of compulsory pilotage is still available in respect of a collision at a place (*e.g.*, Gibraltar) to which the Act does not extend and where the common law applies: *The Arum*, [1921] P. 12; 90 L. J. P. 166.

(*r*) *Jarmain v. Fisher* (1843), 1 D. & L. 169; *Morris v. Salberg* (1889), 22 Q. B. D. 614. C. A.; *Lee v. Rumilly* (1891), 55 J. P. 519, C. A. Comp. *Condy v. Blasberg* (1891), 55 J. P. 580, C. A.

(*s*) *Bates v. Pilling* (1826), 6 B. & C. 38; *Re Ward* (1862), 31 Beav. 1; *Clissold v. Cratchley*, [1910] 2 K. B. 244; 79 L. J. K. B. 635, C. A.

(*t*) *Smith v. Keal* (1882), 9 Q. B. D. 340, C. A.; *Hewitt v. Spiers & Pond, Ltd.* (1896), 13 T. L. R. 64.

(*u*) *Stevens v. Woodward* (1881), 6 Q. B. D. 318; 50 L. J. Q. B. 231.

(*x*) *Ruddiman v. Smith* (1889), 60 L. T. 708.

(*y*) *Whiteley v. Pepper* (1876), 2 Q. B. D. 276; 46 L. J. Q. B. 436; *Daniel v. Rickett*, [1938] 2 A. E. R. 631.

(*z*) *Page v. Defries* (1866), 7 B. & S. 137; overruling *Lamb v. Palk* (1840), 9 C. & P. 629.

(*a*) *The Apollo*, [1891] A. C. 499; 61 L. J. P. 25, H. L.; *The Burlington* (1895), 72 L. T. 890, C. A.; *The Ratata*, [1898] A. C. 513; 67 L. J. P. 73, H. L.; *East London Harbour Board v. Caledonia Shipping Co.*, [1908] A. C. 271; 77 L. J. P. C. 111; *The Bien* (1910), 27 T. L. R. 9.

14. Certain opium, forming part of a ship's cargo, was damaged in the course of the voyage, and was sold by the master. Held, that there being no necessity for the sale, the shipowners were liable to the consignee for the value of the opium (b). An unnecessary sale by a shipmaster of any part of the cargo is a conversion for which the shipowners are liable (c).

15. A jeweller hired from a jobmaster a brougham with horse and driver, for the use of a traveller who visited customers with a stock of jewels. The driver in the temporary absence of the traveller left the carriage unattended and a thief drove it away and stole the jewels. Held, that it was the duty of the jobmaster to supply a driver whose business it should be to act in the usual way as regards taking care of the carriage in the occasional and temporary absence of the traveller, and that the jobmaster was liable for the loss (d).

16. A servant of A, in disregard of written notice issued to A's employees prohibiting the use of privately owned cars for the purposes of A's business unless adequately protected by insurance, used the servant's uninsured car for the purpose of his ordinary work and by negligent driving injured the plaintiff. Held, that the means of transport was incidental to the execution of what the servant was employed to do: that the prohibition merely limited the way in which, or means by which, the servant was to execute the work; and that A was liable to the plaintiff (e). "A master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. . . . On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it" (f). Where the servant acts in breach of a prohibition issued by the master, the question is whether the prohibition limits the sphere of employment or merely deals with conduct within the sphere of employment (g).

17. A sent a car for repair to B's garage. B, by arrangement with A, sent the car to C's works for the repairs to be done. When the repairs were completed, B's manager, who had authority on behalf of B to take delivery of the car from C, drove the car from C's works; but, instead of driving it to B's garage, as was his duty, he used it for a journey of his own, in the course of which it was damaged as the result of his negligent driving. Held, that B was responsible for the manner in which his manager had conducted himself in performing the service of fetching A's car from C's works (h).

(b) *Tronson v. Dent* (1853), 8 Moo. P. C. 419, P. C.

(c) *Evbank v. Nutting* (1849), 7 C. B. 797; *Cannan v. Meaburn* (1823), 1 Bing. 243; *Van Omeron v. Dowick* (1809), 2 Camp. 42.

(d) *Abraham v. Bullock* (1902), 86 L. T. 796, C. A.; see also *Whatman v. Pearson* (1868), L. R. 3 C. P. 422; *Engelhart v. Farrant*, [1897] 1 Q. B. 240; 66 L. J. Q. B. 122, C. A.; *Bontex Knitting Works, Ltd. v. St. John's Garage* (1943), 60 T. L. R. 44, 253, C. A.

(e) *Canadian Pacific Ry. Co. v. Lockhart*, [1942] A. C. 591; 111 L. J. P. C. 113. And see *McKean v. Raynor Bros., Ltd.* (1942), 167 L. T. 369, where a servant, ordered to take his master's lorry upon a message, took a private car.

(f) *Ibid.*, [1942] A. C. at p. 599, quoting with approval Salmond on Torts (9th ed.), p. 95.

(g) *Plum v. Cobden Flour Mills Co., Ltd.*, [1914] A. C. 62, per Lord Dunedin, at p. 66; 83 L. J. K. B. 197.

(h) *Aitchison v. Page Motors, Ltd.* (1935), 154 L. T. 128; 52 T. L. R. 137.

18. A motor car was deposited at A's garage for safe custody. The night watchman at the garage, who was A's servant, took the car out for his own purposes and caused damage to it by negligent driving. Held, that A was liable for the damage (i). The acts of the night watchman were an ill way of executing the work that had been assigned to him (i).

19. A silversmith hired from a jobmaster a brougham and driver for the use of a traveller, it being understood that the traveller would carry valuable samples and that it would be the duty of the driver to take care of the contents of the brougham during the necessary absence of the traveller. The driver, who was reasonably supposed by the jobmaster to be trustworthy, stole the contents of the brougham during the necessary absence of the traveller. Held, that the jobmaster was not liable for the loss, as the theft was a crime committed by a person who, in committing it, severed his connection with his master and became a stranger (k).

20. The driver of a tanker, whose duty included the delivery of petrol into storage tanks, while transferring petrol from the tanker to a storage tank at a garage, struck a match for the purpose of lighting a cigarette, and threw the lighted match on the floor, thereby causing a fire. Held, that his employer was liable for the damage so caused by the negligent act of the driver, which was done in the course of his employment (l).

21. An omnibus driver, in order to prevent a rival omnibus from overtaking him, drove his omnibus across the road and caused the rival omnibus to overturn. The driver had instructions from his employers not to race with or obstruct other omnibuses. Held, that the employers were liable, the wrongful act being done in the course of the driver's employment (m).

22. It is not within the ordinary course of employment of the conductor of an omnibus to drive, and his employers are not liable for injuries caused by his negligent driving (n). But it is the duty of the driver of an omnibus to prevent another person from driving, or, if he allow another person to drive, to see that he drives properly; and where, in breach of this duty, the driver allows the conductor to drive, and damage results from the negligent driving of the conductor, the employers are liable, if the effective cause of the damage be the breach of duty by the driver (o).

23. Where a servant, in driving his master's vehicle for his own purposes, negligently injures a third party, the liability of the master depends upon

(i) *Central Motors (Glasgow), Ltd. v. Cessnock Garage, etc., Co.*, [1925] S. C. 796.

(k) *Cheahire v. Bailey*, [1905] 1 K. B. 337; 74 L. J. K. B. 176, C. A.

(l) *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*, [1942] A. C. 509; 111 L. J. P. C. 138; *Jefferson v. Derbyshire Farmers, Ltd.*, [1921] 2 K. B. 281; 90 L. J. K. B. 1361, C. A. *Williams v. Jones* (1865), 3 H. & C. 602, is not good law: see *Century Insurance Co., Ltd. v. Northern Ireland Transport Board*, *supra*.

(m) *Limpus v. London General Omnibus Co.* (1862), 32 L. J. Ex. 34; 1 H. & C. 526, Ex. Ch.; and see *Green v. London General Omnibus Co.* (1859), 29 L. J. C. P. 13; 7 C. B. (n.s.) 290; *Ward v. General Omnibus Co.* (1837), 42 L. J. C. P. 265, Ex. Ch.; see also *Ellis v. Turner* (1800), 8 T. R. 531; *Croft v. Alison* (1821), 4 B. & A. 590; *Baker v. Snell*, [1908] 2 K. B. 825; 77 L. J. K. B. 1090, C. A.

(n) *Beard v. L. G. O. Co.*, [1900] 2 Q. B. 530; 69 L. J. Q. B. 895 C. A.; *Guilliam v. Twist*, [1895] 2 Q. B. 84; 64 L. J. Q. B. 474, C. A.; and see *Harris v. Fiat Motors* (1900), 22 T. L. R. 566.

(o) *Ricketts v. Tilling*, [1915] 1 K. B. 644; 84 L. J. K. B. 342, C. A.

whether the servant is following his employment or has so far abandoned it that he is not acting on behalf of his master (p).

24. A barman gave a person into custody for attempting to pass bad money, the bad money having been returned and good money paid. Held, that the employer was not liable (q). So, where a booking clerk gave a person into custody for attempting to steal from the till, after the attempt had ceased, the railway company was held not liable (r). The liability of a principal for false imprisonment in such cases depends upon whether it is within the ordinary course of the agent's employment to arrest persons or give them into custody on behalf of the principal, and the general rule is that an agent or servant has implied authority to do so only when such a course is necessary for the protection of his principal's or master's property (s). Where a servant reasonably believes that his master's property is being stolen, he has implied authority, in an emergency, to take reasonable steps to protect it; and if, with this object, he commit an assault, the master will be responsible, unless the servant use such excess of violence that his act is not within the class of acts which he is impliedly authorised to do (t).

25. An agent, acting on behalf of a vendor, makes fraudulent misrepresentations which induce the sale. The principal is liable in an action for deceit, although he did not authorise the agent to make the misrepresentations (u). So a local authority is liable to a contractor for fraudulent misrepresentation, made by their agent, as to the nature of the work to be done under the contract (x). A clause in a contract by which the principal disclaims responsibility for the accuracy of statements made by his agent does not exempt the principal from liability for the agent's fraudulent misrepresentations (x).

26. A solicitor's managing clerk, who had a general authority to conduct the conveyancing business of his principal, induced a widow to give him instructions to realise certain properties with a view to the re-investment of the proceeds. For that purpose she handed him her title deeds, for which

(p) *Joel v. Morison* (1834), 6 C. & P. 501; *Sleath v. Wilson* (1839), 9 C. & P. 607; *Mitchell v. Crassweller* (1853), 22 L. J. C. P. 100; 13 C. B. 237; *Patten v. Rea* (1857), 26 L. J. C. P. 235; 2 C. B. (n.s.) 606; *Storey v. Ashton* (1869), L. R. 4 Q. B. 476; 38 L. J. Q. B. 223; *Cormack v. Digby* (1876), Ir. R. 9 C. L. 557; *Rayner v. Mitchell* (1877), 2 C. P. D. 357; *Hatch v. L. & N. W. Ry.* (1890), 15 T. L. R. 246, C. A.; *Sanderson v. Collins*, [1904] 1 K. B. 628; 73 L. J. K. B. 358; *Coupé Co. v. Maddick*, [1891] 2 Q. B. 413; 60 L. J. Q. B. 676; Illustration 18.

(q) *Abrahams v. Deakin*, [1891] 1 Q. B. 516; 60 L. J. Q. B. 238, C. A.

(r) *Allen v. L. & S. W. Ry.* (1870), L. R. 6 Q. B. 65; 40 L. J. Q. B. 55.

(s) *Edwards v. L. & N. W. Ry.* (1870), L. R. 5 C. P. 445; 39 L. J. C. P. 241; *Bank of New South Wales v. Owen* (1879), 4 App. Cas. 270; 48 L. J. P. C. 25; *Walker v. S. E. Ry.* (1870), L. R. 5 C. P. 640; 39 L. J. C. P. 346; *Rowe v. London Piano-forte Co.* (1876), 34 L. T. 450; *Roe v. Birkenhead, etc., Ry.* (1851), 7 Ex. 36; 21 L. J. Ex. 9; *Stevens v. Hinshelwood* (1891), 55 J. P. 341, C. A.; *Hanson v. Waller*, [1901] 1 K. B. 390; 70 L. J. K. B. 231; *Line v. R. S. P. C. A.* (1902), 18 T. L. R. 634.

(t) *Poland v. Parr*, [1927] 1 K. B. 236; 96 L. J. K. B. 152, C. A.

(u) *Hern v. Nichols* (1701), 1 Salk. 289; *Taylor v. Green* (1837), 8 C. & P. 316; *Udell v. Atherton* (1861), 60 L. J. Ex. 337; 7 H. & N. 172; see also *National Exchange Co. v. Drew* (1855), 2 Maoq. 103, H. L.; *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Ex. 259, Ex. Ch.; *Mackay v. Commercial Bank* (1874), L. R. 5 C. P. 394; 43 L. J. P. C. 31, P. C.; *Blake v. Albion Life Assurance Society* (1878), 4 C. P. D. 94; 48 L. J. C. P. 169; *Hilo Manufacturing Co. v. Williamson* (1911), 28 T. L. R. 164, C. A.

(x) *Pearson v. Dublin Corporation*, [1907] A. C. 351; 77 L. J. P. C. 1, H. L.

he gave her a receipt in his principal's name; and, at his request, she signed two documents, which were not read over or explained to her, and which she thought were necessary for the realisation of the properties. The documents were in fact conveyances of the properties to himself; and he afterwards disposed of the properties for his own benefit. Held, that the principal was liable for the fraud (y).

So, where a solicitor's managing clerk, who was authorised to carry out conveyancing business and to borrow money from building societies, on behalf of clients, upon security of mortgage, obtained an advance from a building society by producing a deed which he knew to be forged, it was held that he was acting within the scope of his apparent authority and that his principal was liable for the fraud, despite the fact that it involved a forgery (z). The authority which the clerk purported to exercise, and which upon the face of it he had got, involved leading third parties to change their position on the faith that the business was genuine (z).

27. If an agent, having control of his principal's business, fraudulently prefer a particular creditor, that is a fraudulent preference by the principal (a).

Misrepresentation by Principal or Agent where Agent or Principal has Knowledge of the True Facts.

Where a principal or his agent makes a representation which is false to the knowledge of either of them, the principal is responsible to the same extent as if the person making the representation had knowledge of its falsity. In this respect the principal and agent are one, and it matters not which of them makes the representation and which had the guilty knowledge (b). The principal is similarly liable where one of his agents makes a false representation and another of his agents has knowledge of the true facts (c), if the latter also knows that the representation is being made (d).

Servant of One Master Working for Another.

A servant may be in the general employment of A, but, as the result of arrangements made between A and B, he may be acting as the servant of B, so as to make B, and not A, responsible for his negligence at the relevant

(y) *Lloyd v. Grace, Smith & Co.*, [1912] A. C. 716; 81 L. J. K. B. 1140, H. L.; see also *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Ex. 259; 36 L. J. Ex. 147, Ex. Ch.; *Mackay v. Commercial Bank of New Brunswick* (1874), L. R. 5 P. C. 394; 43 L. J. P. C. 31, P. C.; *Suire v. Francis* (1877), 3 App. Cas. 106; 47 L. J. P. C. 18, P. C.; *Houldsworth v. City of Glasgow Bank* (1880), 5 App. Cas. 317.

(z) *Uzbridge Permanent Benefit Building Society v. Pickard*, [1939] 2 K. B. 248; 108 L. J. K. B. 757, C. A. As to the liability of a solicitor to the disciplinary action of the Court for the misdeeds of his clerk, see *Myers v. Elman*, [1940] A. C. 282; 109 L. J. K. B. 105.

(a) *Re Drabble*, [1930] 2 Ch. 211; 99 L. J. Ch. 345, C. A.

(b) *Pearson v. Dublin Corporation*, [1907] A. C. 351; 77 L. J. P. C. 1, H. L. Earlier cases must be read in the light of this decision: see *Cornfoot v. Fawke* (1840), 6 M. & W. 358; *Fuller v. Wilson* (1842), 3 Q. B. 58, 68, 1009; *Udell v. Atherton* (1861), 7 H. & N. 172; *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Ex. 259, Ex. Ch.; *Brett v. Clowser* (1890), 5 C. P. D. 376; *Ludgater v. Love* (1881), 44 L. T. 694, C. A.

(c) *London County Freehold etc. Co. v. Berkeley etc., Co.* (1936), 155 L. T. 190, C. A. See a valuable criticism of this decision by Mr. Patrick Devlin in 53 L. Q. R., p. 344.

(d) *Anglo-Scottish Beet Sugar Corporation v. Spalding U. D. C.*, [1937] 2 K. B. 607; 106 L. J. K. B. 885.

time (e). The test is whether the servant is transferred, or only the use and benefit of his work (f), and depends upon the extent to which A places the servant under the control and at the disposition of B (g). Each case must depend upon its own circumstances (h).

Article 103.

MONEY, ETC., MISAPPROPRIATED BY AGENT.

Where the money or property of a third person is received by an agent while acting within the apparent scope of his authority, or is received by the principal, and is misapplied by the agent, the principal is liable to make good the loss (i).

Illustrations.

1. A local manager, acting as agent for a bank, induced a lady to invest money in paying off a certain mortgage. The money was paid to him for that purpose, and he misappropriated it. Held, that he was acting within the apparent scope of his authority in receiving the money, which must therefore be deemed to have been received by the bank, and that the bank was liable to repay it (k).

2. An agent, acting apparently in the ordinary course of business, sent an account to A, representing that certain advances had been made on his account, and drew on him for the amount. It was within the scope of the agent's authority to make advances of that kind, but he had in fact misappropriated the money, and had not made the advances. A accepted and paid the bill. Held, that the principal was liable to A for the amount (l).

(c) *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*, [1942] A. C. 509; per Lord Simon, L.C., at p. 513.

(f) *Ibid.*, and per Lord Wright, at p. 516, both citing *Moore v. Palmer* (1886), 2 T. L. R. 781, per Bowen, L.J., at p. 782.

(g) *Cameron v. Nystrom*, [1893] A. C. 308, per Lord Herschell, L.C., at p. 312; *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*, *supra*, per Lord Wright, at p. 517.

(h) *M'Cartan v. Belfast Harbour Commissioners*, [1911] 2 Ir. R. 143; *Century Insurance Co., Ltd. v. Northern Ireland Road Transport Board*, *supra*, per Lord Wright, at p. 515. For instances in addition to the cases cited above, see *Quarman v. Burnett* (1840), 6 M. & W. 499; *Murray v. Currie* (1870), L. R. 6 P. C. 24; 40 L. J. C. P. 26; *Hourke v. White Moss Colliery Co.* (1877), 2 C. P. D. 205; 46 L. J. Q. B. 283; *Donovan v. Laing, Wharton and Down Construction Syndicate, Ltd.*, [1893] 1 Q. B. 629; 63 L. J. Q. B. 25, C.A.; *London & North Western Ry. Co. v. Ingham*, [1895] 1 Q. B. 585; 65 L. J. Q. B. 585; *Rein v. Central Vermont Ry. Co.*, [1895] 1 Q. B. 585; 65 L. J. Q. B. 585.

Clelland v. Edward Lloyd, Ltd., [1938] 1 K. B. 272; 106 L. J. K. B. 626; *Willard v. Whitley, Ltd.*, [1938] 3 A. E. R. 779.

(i) *Hackney v. Knight* (1891), 7 T. L. R. 254; *London Freehold, etc., Co. v. Suffield*, [1897] 2 Ch. 608; 66 L. J. Ch. 790, C.A.; *Trott v. National Discount Co.* (1900), 17 T. L. R. 37; *Reckitt v. Nunburnholme* (1929), 45 T. L. R. 629. And see Illustrations, and Article 63, Illustration 4. Comp. Article 36, Illustration 3.

(k) *Thompson v. Bell* (1854), 10 Ex. 10; 23 L. J. Ex. 321. Comp. *Bishop v. Jersey* (1854), 23 L. J. Ch. 483; 2 Drew. 143; *Russo-Chinese Bank v. Li Yau Sam*, [1910] A. C. 174; 79 L. J. P. C. 60.

(l) *Swoire v. Francis* (1877), 3 App. Cas. 106; 47 L. J. P. C. 18.

Article 104.

MONEY, ETC., RECEIVED BY, OR APPLIED FOR BENEFIT OF, PRINCIPAL.

Where, by any wrongful or unauthorised act of an agent, the money or property of a third person comes to the hands of the principal, or is applied for his benefit, the principal is liable jointly and severally with the agent to restore the amount or value of such money or property.

Illustrations.

1. A manager, who had no authority to borrow money or overdraw his principal's account, having overdrawn the account and misapplied the money, borrowed £20 for the alleged purpose of paying the principal's workmen (but really to make up the defalcations), paid in into the principal's account, and drew on the account to pay the workmen. Held, that the £20 having been applied for the benefit of the principal, he was liable to repay the amount to the lender (*m*).

2. The secretary of a company forges and discounts certain bills of exchange, and pays the proceeds to his own account, upon which he draws cheques in favour of the company. The company is liable to the discounter to the extent that the proceeds of the bills have been applied for its benefit (*n*).

3. An agent sells, under a forged power of attorney, stock belonging to A. and pays the proceeds to his principal's account. The principal is liable to A for the proceeds (*o*).

4. A banker, having without authority sold certain bonds belonging to A, delivers to A certain other bonds belonging to B, telling A that they were taken in exchange for his bonds. A must deliver up the bonds to B, or pay him their value (*p*).

Article 105.

CORPORATIONS.

Corporations, including incorporated companies (*q*), local authorities (*r*) and statutory undertakers (*s*) are liable for the wrongs of their agents to the same extent as an individual

(*m*) *Reid v. Rigby*, [1894] 2 Q. B. 40; 63 L. J. Q. B. 451; *Bannatyne v. McIver*, [1906] 1 K. B. 103; 75 L. J. K. B. 120, C. A.; *Reversion Fund, etc., Co. v. Maison Cosway*, [1913] 1 K. B. 364; 82 L. J. K. B. 512, C. A.

(*n*) *Ex p. Shoolbred* (1880), 28 W. R. 339.

(*o*) *Marsh v. Keating* (1834), 1 Bing. N. C. 198; 37 R. R. 75, H. L. Comp. Article 36, Illustration 3.

(*p*) *Glyn v. Baker* (1811), 13 East, 509.

(*q*) Illustration 1.

(*r*) *Scott v. Manchester Corporation* (1857), 26 L. J. Ex. 406; 2 H. & N. 204, Ex. Ch.; *Cowley v. Sunderland Corporation* (1861), 30 L. J. Ex. 127; 6 H. & N. 565. Illustration 2.

(*s*) *Mersey Docks Trustees v. Gibbs* (1864), L. R. 1 H. L. 93, H. L.; *Coe v. Wise* (1866), L. R. 1 Q. B. 711; 37 L. J. Q. B. 262; *The Rhosina* (1885), 10 P. D. 131; 54 L. J. P. 72, C. A.; Illustration 3.

principal would be, except where the act of the agent is *ultra vires* of the corporation (*l*).

This article extends to cases in which malice in fact is an essential ingredient in the wrong (*u*).

Illustrations.

1. A company is liable for the wrongs of its agents committed in the course of their employment, *e.g.*, wrongful detention or conversion (*x*), wrongful distress (*y*), trespass (*z*) or fraud (*a*).

2. The medical officers in charge of a maternity home maintained by a county council admitted a patient for her confinement, without informing her that there had been a recent case of puerperal fever in the home and that she would be exposed to infection. The patient contracted puerperal fever. Held, that the county council were liable in damages (*b*). A local authority, carrying on a public hospital, owes to a patient the duty to nurse and treat him properly, and is liable for the negligence of its servants in their conduct of nursing and treatment, even though such negligence occurs while the servant is engaged on work which involves the exercise of professional skill (*c*). And the same duty and liability attach to those who are employers of the servants in a voluntary hospital, *i.e.*, the governors (*d*). In either case, it makes no difference whether the patient be treated gratuitously or for reward (*c*). Where a patient was injured by the negligence of a competent radiographer, who was the whole-time employee of a county council which carried on the hospital under statutory powers (*e*), the County Council was held liable in damages (*c*). Nurses in a hospital are servants for whose negligence such responsibility attaches (*f*); but a nurse provided for a private patient by a nursing association has been held not to be the servant of the association (*g*). Visiting and consultant physicians and surgeons are not the servants of hospital authorities (*h*); but medical practitioners on the permanent staff may be so, if they have entered into a contract of service (*i*).

(*l*) Illustration 4.

(*u*) Illustration 5.

(*x*) *Yarborough v. Bank of England* (1812), 16 East, 6; *Giles v. Taff Vale Ry.*, *Taff Vale Ry. v. Giles* (1853), 2 E. & B. 822; 23 L. J. Q. B. 43; *Barnett v. Crystal Palace Co.* (1861), 4 L. T. 403.

(*y*) *Smith v. Birmingham Gas Co.* (1834), 3 L. J. K. B. 165; 3 N. & M. 771.

(*z*) *Maund v. Monmouth Canal Co.* (1842), 4 M. & G. 452.

(*a*) *Ranger v. G. W. Ry.* (1854), 5 H. L. Cas. 72, H. L.; *Barwick v. English Joint Stock Bank* (1867), L. R. 2 Ex. 259; 36 L. J. Ex. 147, Ex. Ch.

(*b*) *Lindsey C. C. v. Marshall*, [1937] A. C. 97; 105 L. J. K. B. 614, H. L. (E.).

(*c*) *Gold v. Essex C. C.*, [1942] 2 K. B. 293, C. A.

(*d*) *Ibid.* *Hillyer v. St. Bartholomew's Hospital*, [1909] 2 K. B. 820; 78 L. J. K. B. 958, C. A., is supportable on the ground that the plaintiff failed to prove negligence on the part of any servant of the defendants. See *Smith v. Martin*, [1911] 2 K. B. 775, 784; *Gold v. Essex C. C.*, *supra*, at pp. 299, 306, 311.

(*e*) See Public Health Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 49), ss. 181, 184.

(*f*) *Gold v. Essex C. C.*, *supra*. *Strangeways-Leemere v. Clayton*, [1936] 2 K. B. 11; 105 L. J. K. B. 385, was therefore wrongly decided. It may be noted that a nurse is a workman within the Workmen's Compensation Acts: *Wardell v. Kent C. C.*, [1938] 2 K. B. 768, C. A.

(*g*) *Hall v. Lees*, [1904] 1 K. B. 602; 73 L. J. K. B. 819, C. A.

(*h*) *Evans v. Liverpool Corporation*, [1906] 1 K. B. 160; 74 L. J. K. B. 72.

(*i*) See *Gold v. Essex C. C.*, *supra*, per Goddard, L.J., at p. 313.

3. A constable of the borough police is not the agent of the borough corporation in exercising police duty (*k*).

4. Railway and tramway companies are responsible for the torts of their servants committed in the course of their employment, *e.g.*, for assaults upon passengers (*l*). Such servants have, generally, implied authority to remove passengers from carriages in which they are travelling without having paid the proper fare, or are misconducting themselves; and if, under misapprehension, they eject an innocent person, the company is liable for their acts (*m*). Where a porter, believing that a passenger was in the wrong train, pulled him out of the compartment, it was held that the jury might find that the porter was acting within the scope of his employment, although it was not part of the porter's duty to remove passengers from the wrong train (*n*). Where the servant of the company is entitled to eject a passenger, the company will be liable if unnecessary violence be used (*o*). But, in any case, the company will not be liable, if the servant be acting from private spite and not in purported pursuance of his duty (*p*).

5. A station-master detained a person for not having paid the fare for his horse, the railway company having no power to arrest in such cases. Held, that the company was not liable, because it was beyond its powers to authorise the detention, and the act was therefore necessarily outside the scope of the station-master's employment (*q*). Otherwise, if the company had power to arrest (*r*). Where a tram conductor gave a passenger into custody for tendering what the conductor thought was bad money, the company was held liable (*s*).

6. A, who had been an agent of an insurance company, and had entered the service of a rival company, visited policy-holders in the first-mentioned company in order to persuade them to transfer their insurances to the rival company, and made derogatory statements concerning the first-mentioned company. B, who was a superintendent of agencies of the first-mentioned company, in order to counteract the injury A was doing to the company's business, but without being expressly authorised to do so, wrote a circular letter to policy-holders containing defamatory statements concerning A

(*k*) *Fisher v. Oldham Corporation*, [1930] 2 K. B. 364; 99 L. J. K. B. 569.

(*l*) The fact that the agent has been convicted and punished for the assault does not affect the liability of the principal: *Dyer v. Munday*, [1895] 1 Q. B. 742; 64 L. J. Q. B. 448, C. A.

(*m*) *Lowe v. G. N. Ry.* (1893), 62 L. J. Q. B. 524; *Whitaker v. L. C. C.*, [1915] 2 K. B. 676; 84 L. J. K. B. 1446.

(*n*) *Bayley v. Manchester, Sheffield and Lincolnshire Ry.* (1873), L. R. 8 C. P. 148; 42 L. J. C. P. 78, Ex. Ch.

(*o*) *Seymour v. Greenwood, Greenwood v. Seymour* (1861), 7 H. & N. 355; 30 L. J. Ex. 327; *Smith v. North Met. Tram. Co.* (1891), 55 J. P. 630, C. A.

(*p*) *Hutchins v. L. C. C.* (1915), 85 L. J. K. B. 1177.

(*q*) *Poultton v. L. & S. W. Ry.* (1867), L. R. 2 Q. B. 534; 36 L. J. Q. B. 294. See also *Charleston v. London Tram. Co.* (1888), 36 W. R. 367, C. A.; *Ormiston v. G. W. Ry.*, [1917] 1 K. B. 598; 86 L. J. K. B. 759.

(*r*) *Goff v. G. N. Ry.* (1861), 30 L. J. Q. B. 148; 3 E. & E. 672; *Moore v. Metropolitan Ry.* (1872), L. R. 8 Q. B. 36; 42 L. J. Q. B. 23; *Farry v. G. N. Ry.*, [1898] 2 I. R. 352. A special constable of a railway company is a servant of the company: *Lambert v. G. E. Ry.*, [1909] 2 K. B. 776; 79 L. J. K. B. 32, C. A.

(*s*) *Furlong v. South London Tram. Co.* (1884), 48 J. P. 329; 1 C. & E. 316; *Percy v. Glasgow Corp.*, [1922] 2 A. C. 299; 91 L. J. P. C. 187, H. L. Comp. *Knight v. North Metropolitan Tram. Co.* (1898), 78 L. T. 227.

which B knew to be false. It was held that the malice of B was imputable to the company, and the libel having been published in the course of B's employment, that the company was liable therefor (t). So, it has been held that a voluntary association is liable for a libel published by its servant in the course of his employment, though without special instructions (u). And an action for malicious prosecution is maintainable against a corporation or incorporated company (z).

Article 106.

TRADE UNIONS.

No action will lie against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members, in respect of any tortious act alleged to have been committed by or on behalf of the trade union (y) unless such act be done in contemplation or furtherance of a strike or lock-out declared illegal by the Trade Disputes and Trade Unions Act, 1927 (z).

Article 107.

EFFECT OF JUDGMENT IN TORT AGAINST PRINCIPAL OR AGENT. CONTRIBUTION.

Where damage is suffered by any person as the result of a tort, whether a crime or not, judgment recovered against any tortfeasor liable in respect of that damage is not a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage (a).

If more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for

(t) *Citizens' Life Assurance Co. v. Brown*, [1904] A. C. 423; 73 L. J. P. C. 102, P. C. See also *Whitfield v. South Eastern Ry.* (1858), E. B. & E. 115; *R. v. London* (1858), E. B. & E. 122; *Nevill v. Fine Arts Insurance Co.*, [1895] 2 Q. B. 156; 64 L. J. Q. B. 681, C. A.; *Fitzsimmons v. Duncan*, [1908] 2 I. R. 483, C. A.; and compare *Glasgow Corporation v. Lorimer*, [1911] A. C. 209; 80 L. J. P. C. 175, H. L.; *Aiken v. Caledonian Ry.*, [1913] S. C. 66.

(u) *Ellis v. National Free Labour Assn.* (1805), 7 F. 629.

(z) *Cornford v. Carlton Bank*, [1899] 1 Q. B. 392; 68 L. J. Q. B. 196.

(y) Trade Disputes Act, 1906 (6 Edw. 7, c. 4), s. 4. The section applies whether the alleged wrong is committed in contemplation or furtherance of a trade dispute or not: *Vacher v. London Society of Compositors*, [1913] A. C. 107; 82 L. J. K. B. 232, H. L. It extends to an action for an injunction: *Ware and De Freville v. Motor Trades Assn.*, [1921] 3 K. B. 40; 90 L. J. K. B. 949.

(z) 17 & 18 Geo. 5, c. 22. See s. 1, which declares that any strike or lock-out is illegal if it has any object other than or in addition to the furtherance of a trade dispute within the trade or industry in which the strikers, or employers locking-out, as the case may be, are engaged, and is a strike, or lock-out, designed or calculated to, coerce the Government either directly or by inflicting hardship upon the community.

(a) Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 30), s. 6 (1). This provision abolishes the rule at common law by which judgment against one joint tortfeasor was a bar to an action against the other or others: see *Brinsmead v. Harrison* (1872), L. R. 7 C. P. 547. A judgment against the principal or agent for a tort committed by the agent is no longer a bar to an action against the agent or principal as the case may be.

the benefit of the estate or of the wife, husband, parent (b) or child (b) of that person against tortfeasors liable in respect of the damage, whether as joint tortfeasors or otherwise, the sums recoverable under the judgments given in those actions may not in the aggregate exceed the amount of the damages awarded by the judgment first given (c) and in any of those actions, other than that in which judgment is first given, the plaintiff will not be entitled to costs unless the Court is of opinion that there was reasonable ground for bringing the action (d).

Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this provision from any person entitled to be indemnified by him in respect of the liability in respect of which contribution is sought (e).

In any proceedings for contribution under this provision the amount of the contribution recoverable from any person is such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the Court has power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity (f).

Article 108.

MISREPRESENTATIONS BY AGENT AS TO CREDIT, ETC. OF THIRD PERSONS.

No action can be maintained against a principal in respect of any representation as to the character, conduct, credit, ability, trade or dealings of another person, to the intent that such other person may obtain credit (g), unless such representa-

(b) The expressions "parent" and "child" have the same meaning as in the Fatal Accidents Acts, 1846, 1864 and 1908 (9 & 10 Vict. c. 93; 27 & 28 Vict. c. 95; 8 Edw. 7. c. 7), as amended by the Law Reform (Miscellaneous Provisions) Act, 1934 (24 & 25 Geo. 5, c. 41), s. 2; see Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 30), s. 3. The expression "parent" therefore includes a parent (legitimate or related to the child illegitimately, or by adoption), grandparent and step-parent; and the expression "child" includes a child (legitimate, illegitimate, or adopted), grandchild and stepchild.

(c) Where the judgment first given is reversed on appeal, these words refer to the judgment first given which is not so reversed; and where the judgment first given is varied on appeal, the reference is to the judgment so varied: *ibid.*, s. 6 (3) (b).

(d) *Ibid.*, s. 6 (1) (b).

(e) *Ibid.*, s. 1 (c). Nothing in the section renders enforceable any agreement for indemnity which would not have been enforceable if the section had not been passed: *ibid.*, s. 6 (4). See Article 72.

(f) *Ibid.*, s. 6 (2). The Court may order a servant, whose tort has involved his master in liability, to contribute to the extent of the total amount of the damages: *Ryan v. Fildes*, [1938] 3 A. E. R. 517.

(g) "May obtain credit, money or goods upon (sic), unless, etc."

tion is in writing, signed by the principal—the signature of an agent is not sufficient, even if expressly authorised by the principal (h).

Sect. 4.—*Admissions by and Notice to Agents.*

Article 109.

AGENT'S ADMISSIONS WHEN EVIDENCE AGAINST THE PRINCIPAL.

An admission or representation made by an agent is admissible in evidence against the principal in the following cases: namely,

- (a) Where it was made with the authority, express or implied, of the principal;
- (b) Where it has reference to some matter or transaction upon which the agent was employed on the principal's behalf at the time when the admission or representation was made, and was made in the course of that employment (i);
- (c) Where it has reference to some matter or transaction respecting which the person to whom the admission or representation was made had been expressly referred by the principal to the agent for information (k).

Provided always, that a report made by an agent to his principal cannot be put in evidence against the principal by a third person as an admission made on behalf of the principal (l).

No principal is bound by any unauthorised admission or representation concerning any matter upon which the agent who made it was not employed on his behalf at the time when it was made (m), or which was not made in the course of the

(h) Statute of Frauds Amendment Act, 1828 (Lord Tenterden's Act; 9 Geo. 4, c. 14), s. 6; *Swift v. Jewsbury* (1874), L. R. 9 Q. B. 301; 43 L. J. Q. B. 56, Ex. Ch.; *Williams v. Mason* (1873), 28 L. T. 232. The Act applies to cases where the principal is an incorporated company: *Hirst v. West Riding Banking Co.*, [1901] 2 K. B. 560; 70 L. J. K. B. 828, C. A.

(i) Illustrations 1 to 8. *Standage v. Creighton* (1832), 5 C. & P. 406; *Meux's Exors.' case* (1852), 2 De G. M. & G. 522; *Ellis v. Thompson* (1838), 3 M. & W. 445; 7 L. J. Ex. 185. As to statements in bills of lading signed by the master, see *M'Lean v. Fleming* (1871), 2 H. L. Sc. App. 128, H. L.; *Lishman v. Christie* (1887), 19 Q. B. D. 333, C. A.; *Smith v. Bedouin S. N. Co.*, [1896] A. C. 70, H. L. Sc.; *Howard v. Tucker* (1831), 1 B. & Ad. 712; *The Ida* (1875), 32 L. T. 541, P. C.; *The Prosperino Palasso* (1872), 29 L. T. 622; *Compania Naviera Vasconzada v. Churchill*, [1906] 1 K. B. 237; 75 L. J. K. B. 94; *Crossfield v. Kyle Shipping Co.*, [1916] 2 K. B. 885; 85 L. J. K. B. 1310, C. A.

(k) Illustration 9.

(l) Illustrations 12 and 13. *Re Djambi (Sumatra) Rubber Estates* (1912), 107 L. T. 631; *Reyner v. Pearson* (1812), 4 Taunt. 662; 13 R. R. 723; *Kahl v. Jansen* (1812), 4 Taunt. 565; *Swan v. Miller*, [1919] 1 Ir. R. 151. See, however, *The Solway* (1885), 10 P. D. 137; 54 L. J. P. 83. If it were material to show that the principal had knowledge of the facts in such report, the report would, for that purpose, be admissible.

(m) Illustrations 6 and 7. *Fairlie v. Hastings* (1803), 10 Ves. 123; *Belham v. Benson* (1818), Gow. 45; *Peto v. Hague* (1804), 5 Esp. 134; *Allen v. Denstone* (1839), 8 C. & P. 760; *Tunley v. Evans* (1845), 14 L. J. Q. B. 116; 2 D. & L. 747; *Wagstaff v. Wilson* (1832), 4 B. & Ad. 339; *Snowball v. Goodriche* (1833), 4 B. & Ad. 541.

agent's employment (*n*), unless he expressly referred to the agent for information on the particular matter (*o*).

Illustrations.

1. A parcel sent by railway was lost in transit. The station-master, in the ordinary course of his duty, made a statement to the police as to the absconding of a porter. Held, that the statement was admissible in evidence as an admission by the railway company (*p*).

2. In an action against a railway company for not delivering certain cattle within a reasonable time, it appeared that a servant of the company, a week after the alleged cause of action arose, in answer to the question why he had not sent on the cattle, said that he had forgotten them. Held, that this admission was not admissible in evidence against the company, because it concerned a bygone transaction (*q*).

3. A shipmaster contracted by charterparty to carry certain goods. In an action against the shipowners for not carrying and delivering certain of the goods, letters written by the master to the plaintiff were admitted in evidence to show that the goods had been duly received (*r*). So, where an agent, who was employed to buy certain goods, acknowledged having received them, it was held that the acknowledgment was evidence of a delivery to the principal (*s*).

4. An agent is employed to pay workmen for work done. A promise by him to pay is an admission which can be used against the principal as evidence that the money is due, and if the promise be in writing and signed by the agent, it interrupts the operation in the principal's favour of the Statute of Limitations (*t*).

5. A wife carries on a business on her husband's behalf, and purchases all the goods required for such business. An admission by her as to the state of accounts between her husband and the persons supplying the goods is evidence against the husband, and a written and signed promise by her to pay interrupts the operation of the Statute of Limitations (*u*). So, a part-payment by an agent, in the course of his employment, of a debt owing by the principal, interrupts the operation of the Statute of Limitations (*x*).

(*n*) Illustrations 10 and 11. *Schumack v. Lock* (1825), 10 Moore, 39; *Garth v. Howard* (1832), 1 L. J. C. P. 139; 1 M. & Scott, 628; 4 R. R. 753; *Whitehouse v. Abberley* (1845), 1 C. & K. 642; *Olding v. Smith* (1852), 16 Jur. 497; *Meredith v. Footner* (1843), 12 L. J. Ex. 183; 11 M. & W. 202.

(*o*) Illustration 9.

(*p*) *Kirkstall Brewery v. Furness Ry.* (1874), L. R. 9 Q. B. 468; 43 L. J. Q. B. 142. See also *Ruddy v. Mid. G. W. Ry.* (1880), 8 L. R. Ir. 224; *Machin v. South Western Ry.* (1847), 10 L. T. (o.s.) 288.

(*q*) *G. W. Ry. v. Willis* (1865), 34 L. J. C. P. 195; 18 C. B. (n.s.) 748; *Johnson v. Lindsay* (1889), 53 J. P. 599.

(*r*) *British Columbia, etc., Co. v. Nettlehip* (1868), L. R. 3 C. P. 330; 37 L. J. C. P. 235.

(*s*) *Biggs v. Lawrence* (1789), 3 T. R. 454; 1 R. R. 740.

(*t*) *Burt v. Palmer* (1804), 5 Esp. 145: see now Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), ss. 23, 24.

(*u*) *Anderson v. Sanderson* (1817), 2 Stark. 204; *Palathorp v. Furnish* (1796), 2 Esp. 511, n.; *Emerson v. Blonden* (1794), 1 Esp. 142; *Meredith v. Footner* (1843), 11 M. & W. 202; 12 L. J. Ex. 183. See Article 19 as to a wife's acknowledgment of a debt for necessities.

(*x*) See notes (*t*) and (*u*), above. *Jones v. Hughes* (1850), 5 Ex. 104; 19 L. J. Ex. 200; *Re Hale, Lilley v. Foad*, [1899] 2 Ch. 107; 68 L. J. Ch. 517, C. A.; *Watson v. Woodman* (1875), L. R. 20 Eq. 721; 45 L. J. Ch. 57.

6. A beneficiary under a will mortgages his share of the testator's estate. The trustees of the will are not the agents of the mortgagor beneficiary to give an acknowledgment of the right of the mortgagee within section 8 of the Real Property Limitation Act, 1874 (y).

7. A solicitor or counsel is retained to conduct an action. Statements made by him in the conduct and for the purposes of the action are evidence against the client (z). But statements made by him in casual conversation, and not in the course and for the purposes of the action, are not (a). So, statements made by a solicitor for the purposes of one action cannot be used as evidence in another action which the solicitor is conducting on behalf of the same client (b); and admissions made by counsel at a trial have been held not to be binding at a new trial which had been ordered by the Court of Appeal (c).

8. An officer or member of a corporation or company answers interrogatories on its behalf. The answers may be read as an admission by the corporation or company (d).

9. A refers B to C, for information concerning a particular matter. Statements made by C to B respecting such matter are evidence against A (e).

10. The secretary of a tramway company represented that certain money was due from the company. Held, that the company was not estopped by such representation from saying that the money was not due, because it was not within the scope of the secretary's employment to make any such representation (f).

11. An agent was authorised to offer part of a debt in discharge of the whole. The creditor refused payment on those terms, and the agent then, without the principal's authority, paid the amount in part discharge of the debt. Held, that such part-payment did not take the debt out of the operation of the Statute of Limitations (g).

12. The chairman of a company makes a statement at a meeting of shareholders. The statement is not an admission made on behalf of the company and cannot be put in evidence as such against the company by any third person (h).

13. An agent writes letters to his principal containing an account of transactions performed on his behalf. The letters cannot be put in evidence

(y) 37 & 38 Vict. c. 57 (repealed); *Re Edward's Will Trusts*, [1937] Ch. 553; 106 L. J. Ch. 347. See now Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), s. 23.

(z) *Marshall v. Cliff* (1815), 4 Camp. 133; *Haller v. Worman* (1861), 3 L. T. 741.

(a) *Peitch v. Lyon* (1846), 9 Q. B. 147; 15 L. J. Q. B. 393; *Parkins v. Hawkshaw* (1814), 2 Stark. 239; *Wilson v. Turner* (1808), 1 Taunt. 398; *Young v. Wright* (1807), 1 Camp. 140; *Richardson v. Peto* (1840), 1 M. & G. 896.

(b) *Blackstone v. Wilson* (1857), 26 L. J. Ex. 229.

(c) *Dawson v. Great Central Ry.* (1919), 88 L. J. K. B. 1177, C. A.

(d) *Welsbach, etc., Co. v. New Sunlight Co.*, [1900] 2 Ch. 1; 69 L. J. Ch. 546, C. A.

(e) *Williams v. Innes* (1808), 1 Camp. 364; *Hood v. Reeve* (1823), 3 C. & P. 532; *Burt v. Palmer* (1804), 5 Esp. 145.

(f) *Barnett v. South London Tram. Co.* (1887), 18 Q. B. D. 815, C. A.

(g) *Linsell v. Bonsor* (1835), 2 Bing. N. C. 241.

(h) *Re Devala Provident, etc., Co.*, ex p. *Abbott* (1883), 22 Ch. D. 593; 52 L. J. Ch. 434; and see *Re Djambi (Sumatra) Rubber Estates* (1912), 107 L. T. 631; *Cooper v. Metropolitan Board of Works* (1883), 25 Ch. D. 472; 53 L. J. Ch. 109, C. A.

against the principal by third persons as admissions made on behalf of the principal (i).

Article 110.

WHEN NOTICE TO AGENT EQUIVALENT TO NOTICE TO PRINCIPAL.

Where any fact or circumstance, material to any transaction, business, or matter in respect of which an agent is employed, comes to his knowledge in the course of such employment, and is of such a nature that it is his duty to communicate it to his principal, the principal is deemed to have notice thereof as from the time when he would have received such notice if the agent had performed his duty, and taken such steps to communicate the fact or circumstance as he ought reasonably to have taken (k). Provided that—

- (a) Where an agent is party or privy to the commission of a fraud upon or misfeasance against his principal, his knowledge of such fraud or misfeasance, and of the facts and circumstances connected therewith, is not imputed to the principal (l); and
- (b) Where the person seeking to charge the principal with notice knew that the agent intended to conceal his knowledge from the principal, such knowledge is not imputed to the principal (m).

Knowledge acquired by an agent otherwise than in the course of his employment on the principal's behalf (n), or of any fact or circumstance which is not material to the business in respect of which he is employed (o), is not imputed to the principal.

Illustrations.

1. An agent of an insurance company negotiated a contract of insurance with a man who had lost the sight of an eye. Held, that the company must be deemed to have had notice that the assured had lost the sight of an eye,

(i) *Langhorn v. Allnutt* (1812), 4 Taunt. 511.

(k) Illustrations 1 to 9. *Attwood v. Small* (1838), 6 C. & F. 232; 49 R. R. 115, H. L.; *Re Halifax Sugar Co.* (1891), 7 T. L. R. 293, C. A.; *Ex p. Agra Bank, re Worcester* (1868), L. R. 3 Ch. 555; 37 L. J. Bk. 23; *Graves v. Legg* (1857), 2 H. & N. 210; 26 L. J. Ex. 316; 115 R. R. 497, Ex. Ch.; *Gosling's case* (1829), 3 Sim. 301; *Rowland v. Chapman* (1901), 17 T. L. R. 669; *Rainford v. Keith*, [1906] 2 Ch. 147; 74 L. J. Ch. 531, C. A.; *Bunbury v. Hibernian Bank*, [1908] 1 Ir. R. 261.

(l) Illustrations 10 to 12. *Re Hampshire Land Co.*, [1896] 2 Ch. 743; 65 L. J. Ch. 860; *Houghton v. Nothard*, [1928] A. C. 1; 97 L. J. K. B. 76, H. L.; *Newsholme v. Road Transport, etc., Co.*, [1929] 2 K. B. 358; 98 L. J. K. B. 751, C. A.

(m) *Szarpe v. Foy* (1868), 17 W. R. 65, Ch. App.

(n) Illustration 13. *Wythes v. Labouchere* (1859), 3 De G. & J. 593; *Re Marseilles Ry., ex p. Crédit Foncier* (1872), L. R. 7 Ch. 161; 41 L. J. Ch. 345; *Welsbach, etc. Co. v. New Sunlight Co.*, [1900] 2 Ch. 1; 69 L. J. Ch. 546, C. A.; *Wells v. Smith*, [1914] 3 K. B. 722; *Taylor v. Yorkshire Ins. Co.*, [1913] 2 Ir. R. 1; *The Hayle*, [1929] P. 275; 99 L. J. P. 145.

(o) Illustrations 14 to 18. *Wilde v. Gibson* (1848), 1 H. L. Cas. 605, H. L.

and that it could not avoid the contract on the ground of non-disclosure by him of that fact (p).

2. A broker bought goods from a factor, knowing him to be selling on behalf of a principal. Held, that the principal for whom the broker acted must be deemed to have had notice that the factor was not selling his own goods (q).

3. A ship was driven on a rock and damaged. The master afterwards wrote a letter to the owner, but did not communicate the fact of the ship having been damaged, and, subsequent to the receipt of the letter, the owner insured the ship. Held, that the master ought to have communicated the fact, and that therefore the owner must be deemed to have had knowledge of it at the time of the insurance (r). So, where an agent shipped goods, and, having heard of a loss, purposely refrained from telegraphing to the principal because he thought it might prevent him from insuring, it was held that it was his duty to have telegraphed, and that an insurance effected by the principal after the time when he would have received the telegram was void on the ground of non-disclosure of material facts (s).

4. A broker was employed to effect an insurance, but did not effect it. Subsequently, another broker effected a policy in respect of the same risk, on behalf of the same principal. It was sought to avoid the policy on the ground of the non-disclosure of a material fact which had come to the knowledge of the first-mentioned broker in the course of his employment, but which he had not communicated to the principal, and which was not known, either to the principal or to the broker who effected the policy. Held, that the policy was valid (t). It is not the duty of a broker who is employed to effect an insurance to communicate material facts coming to his knowledge to the principal, but only to the insurer (t).

5. A has a dog, which is kept at his stables under the care and control of his coachman. The coachman's knowledge of the ferocity of the dog is equivalent to A's knowledge thereof (u). So, where the wife of A occasionally attended to his business, which was carried on upon premises where a dog was kept, and B made a complaint to her, for the purpose of its being communicated to A, that the dog had bitten B's nephew, it was held that that was evidence of scienter on the part of A (x). So, where complaints were made of a publican's dog, to his barman (y). But the mere fact that a servant

(p) *Bawden v. London, etc., Ass. Co.*, [1892] 2 Q. B. 534, C. A. And see *Holdsworth v. Lancashire and Yorkshire Insurance Co.* (1907), 23 T. L. R. 521; *Thornton-Smith v. Motor Union Ins. Co.* (1913), 30 T. L. R. 139; *Golding v. Royal London, etc., Ins. Co.* (1914), 30 T. L. R. 350; *Ayrey v. British Legal, etc., Ass.*, [1918] 1 K. B. 136; 87 L. J. K. B. 513; *Keeling v. Pearl Ass. Co.* (1923), 129 L. T. 573. Comp. Illustration 12.

(q) *Dresser v. Norwood* (1864), 17 C. B. (N.S.) 466; 34 L. J. C. P. 48, Ex. Ch.

(r) *Gladstone v. King* (1813), 1 M. & S. 35.

(s) *Proudfoot v. Montefiori* (1867), L. R. 2 Q. B. 511; 36 L. J. Q. B. 225; *Fitzherbert v. Mather* (1785), 1 T. R. 12; 1 R. R. 134.

(t) *Blackburn v. Vigors* (1887), 12 App. Cas. 531; 57 L. J. Q. B. 114, H. L.

(u) *Baldwin v. Casella* (1872), L. R. 7 Ex. 325; 41 L. J. Ex. 167.

(x) *Gladman v. Johnson* (1867), 36 L. J. C. P. 153; *Plimmer v. Sells* (1834), 3 N. & M. 422. Cp. *Miller v. Kimbray* (1867), 16 L. T. 360 (widow not affected by notice to deceased husband).

(y) *Applebee v. Percy* (1874), L. R. 9 C. P. 647; 43 L. J. C. P. 365.

knows a dog to be dangerous is no evidence of scienter on the part of the master, where the servant has nothing to do with the care or control of the dog, and has not the control of the premises or place where it is kept (z).

6. Notice of withdrawal of an application for shares was given during business hours to a clerk at the registered office of the company, the clerk stating that the secretary was out. Held, that it operated as notice to the company (a).

7. A notice to quit is served at the house of a tenant upon a servant whose duty it is to deliver it to the tenant. That is good service on the tenant, though the servant does not deliver the notice to him (b).

8. The solicitor of a judgment creditor, having issued execution against the debtor, instructed A, a solicitor at the place where the execution was levied, to take an assignment of the goods seized from the sheriff. A did so, after having received notice of an act of bankruptcy by the debtor. Held, that the creditor must be deemed to have taken the assignment with notice of the act of bankruptcy (c). So, if a solicitor, with the consent of his client, put his managing clerk in his place to conduct and manage the matter, notice of an act of bankruptcy to the clerk operates as notice to the solicitor and to the client (d).

9. A solicitor induced a client to advance money on mortgage and afterwards induced another client to advance money on the same land. Held, that the last-mentioned client must be deemed to have had notice of the prior mortgage (e).

10. A solicitor in the course of a transaction on his client's behalf, became a party to a fraud on the client. Held, that that did not operate as notice to the client of the fraudulent act, because no person would be likely to disclose his own fraud to the person defrauded (f). So, where the directors of a company took part in a misfeasance against the company, it was held that their knowledge did not operate as notice to the company of the misfeasance (g). But the mere fact that the agent has an interest in concealing facts from his principal is not sufficient to prevent his knowledge of those facts from being imputed to the principal, where it is his duty to communicate them (h).

(z) *Stiles v. Cardiff Nav. Co.* (1864), 33 L. J. Q. B. 310; *Cleverton v. Uffernel* (1887), 3 T. L. R. 509; *Colgett v. Norrish* (1886), 2 T. L. R. 471, C. A.

(a) *Truman's case*, [1894] 3 Ch. 272; 63 L. J. Ch. 635.

(b) *Tanham v. Nicholson* (1872), L. R. 5 H. L. 561, H. L.

(c) *Brewin v. Briscoe* (1859), 28 L. J. Q. B. 329; 2 El. & El. 116; *Rothwell v. Timbrell* (1842), 1 Dowl. (N.S.) 778.

(d) *Re Ashton ex p. McGowan* (1891), 64 L. T. 28; *Pike v. Stephens* (1848), 12 Q. B. 465; 17 L. J. Q. B. 282; *Pennell v. Stephens* (1849), 18 L. J. C. P. 291; 7 C. B. 987.

(e) *Rolland v. Hart* (1871), L. R. 6 Ch. 678; 40 L. J. Ch. 701. And see *Le Neve v. Le Neve* (1747), 1 Ves. 64.

(f) *Cave v. Cave*, *Chaplin v. Cave* (1880), 15 Ch. D. 639; 49 L. J. Ch. 505; *Kennedy v. Green* (1834), 3 Myl. & K. 699; *Waldy v. Gray* (1875), L. R. 20 Eq. 238; 44 L. J. Ch. 394. Comp. Illustration 11.

(g) *Re Fitzroy Bessemer Steel Co.* (1884), 50 L. T. 144.

(h) *Thompson v. Cartwright* (1863), 33 Beav. 178; *Rolland v. Hart*, *supra*, note (e); *Bradley v. Riches* (1878), 9 Ch. D. 189; 47 L. J. Ch. 811; *Dixon v. Winch*, [1900] 1 Ch. 736; 69 L. J. Ch. 465, C. A. See Illustration 11.

11. A solicitor sells or mortgages property, and himself draws the purchase or mortgage deed and carries the transaction through on behalf, and with the consent, of the purchaser or mortgagee. The purchaser or mortgagee is deemed to have notice of all incumbrances known to the solicitor, even if the solicitor fraudulently conceal them (*i*).

12. An insurance proposal form, signed by the proposer, contained untrue answers which were warranted to be true and which formed the basis of the contract. The answers were filled in by the insurance company's agent, whom the proposer had requested or permitted to fill in the form, after informing him of the true facts. Held, that the company were entitled to repudiate liability on the ground of the untrue answers (*k*). The agent, in filling in the form, was the agent of the proposer. If the agent knew that the answers were untrue, he was committing a fraud which prevented his knowledge being the knowledge of the company; if he did not know, he had no knowledge to be imputed to the company (*k*).

13. The secretary or a director of a company, in his private capacity, and when he is not transacting the business of the company, casually acquires knowledge of certain facts concerning the company's business. That does not operate as notice to the company of such facts (*l*). So, if a person be secretary of two companies, knowledge acquired by him as secretary of one of the companies will not be imputed to the other company, unless the knowledge was acquired in such circumstances as to make it his duty to communicate it to such other company (*m*).

14. A solicitor who was employed to transfer a mortgage knew that there were incumbrances on the property subsequent to such mortgage. Held, that his knowledge did not operate as notice of the incumbrances to the transferee, because the incumbrances were not material to the transfer, for which alone the solicitor was employed (*n*). As a general rule, in order that the principal may be deemed to have notice of facts coming to the knowledge of his agent, the facts must come to the agent's knowledge in the course of the transaction with respect to which the question of notice arises (*o*), or, at all events, must be fresh in his memory at the time of such transaction (*p*).

(*i*) *Atterbury v. Wallis* (1856), 25 L. J. Ch. 792; *Re Weir* (1888), 58 L. T. 792; *Boursot v. Savage* (1866), L. R. 2 Eq. 134; 35 L. J. Ch. 627; *Dryden v. Frost* (1837), 8 L. J. Ch. 235; 3 Myl. & C. 670; 45 R. R. 344; *Sheldon v. Cox* (1764), 2 Eden, 224; *Dixon v. Winch* [1900] 1 Ch. 736; 69 L. J. Ch. 465, C.A. Comp. *Espin v. Pemberton* (1859), 3 De G. & J. 547; *Hewitt v. Loosemore* (1851), 21 L. J. Ch. 69; 9 Hare, 449; Illustration 10.

(*k*) *Newsholme v. Road Transport, etc., Co.*, [1929] 2 K. B. 356; 98 L. J. K. B. 751, C.A. See Article 83, Illustration 10; *Dunn v. Ocean Accident, etc.* (1933), 50 T. L. R. 32, C. A.

(*l*) *Société Générale de Paris v. Tramways Union Co.* (1884), 14 Q. B. D. 424; 54 L. J. Q. B. 177, C. A.; *Ex p. Boulton, re Sketchley* (1857), 26 L. J. Bk. 45; 1 De G. & J. 163; *Ex p. Carbis* (1834), 4 Dea. & Ch. 354; *Re Payne, Young v. Payne*, [1904] 2 Ch. 608; 73 L. J. Ch. 849, C. A.

(*m*) *Re Fenwick, Deep Sea Fishery Co.'s claim*, [1902] 1 Ch. 507; 71 L. J. Ch. 321.

(*n*) *Wyllie v. Pollen* (1863), 32 L. J. Ch. 782; *Brittain v. Brown* (1871), 24 L. T. 504.

(*o*) *Hiern v. Mill* (1806), 13 Ves. 120; *Wyllie v. Pollen*, *supra*.

(*p*) *Fuller v. Benett* (1842), 12 L. J. Ch. 355; 2 Hare, 394.

15. Directors of a banking company, who had no voice in the management of the accounts, acquired a knowledge of certain circumstances relating to the accounts. Held, that this did not operate as notice of such circumstances to the company (*g*).

16. An underwriter sought to avoid a policy on the ground of the non-disclosure of a material fact. The fact had been disclosed to his solicitor, but had not been communicated to him. Held, that he was not bound by the disclosure to his solicitor, it not being in the ordinary course of a solicitor's employment to receive mercantile notices as to mercantile transactions (*r*). So, the knowledge of Lloyd's agents is not imputable to individual members of Lloyd's (*s*).

17. Notice of a bankruptcy petition against an execution debtor is given to the man left in possession by the sheriff. That does not operate as notice to the sheriff, because the man in possession is only his agent for the purpose of levying, selling the goods, and handing over the proceeds (*t*).

18. Notice of an incumbrance was given to a solicitor, who had been employed by trustees in all matters relating to the trust in which professional assistance was required, but who had not been authorised to receive notices on their behalf, and the solicitor wrote accepting the notice on behalf of the trustees. Held, that the notice to the solicitor did not operate as notice to the trustees, solicitors not being, as such, standing agents of their clients to receive notices on their behalf (*u*).

Notice to Purchasers for Value.

The Law of Property Act, 1925 (*x*), s. 199, provides that a purchaser of property for valuable consideration shall not be prejudicially affected by notice of any instrument, fact, or thing, unless it is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such (*y*), or of his solicitor, or other agent, as such (*y*), or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent (*z*).

(*g*) *Powles v. Page* (1846), 3 C. B. 16; *Re Carew's Estate Act* (1862), 31 Beav. 39.

(*r*) *Tate v. Hyslop* (1885), 15 Q. B. D. 368; 54 L. J. Q. B. 592, C. A.

(*s*) *Wilson v. Salamandra Ass. Co.* (1903), 88 L. T. 96.

(*t*) *Ex p. Warren* (1885), 1 T. L. R. 430, C. A.

(*u*) *Saffron Walden Building Society v. Raymer* (1880), 14 Ch. D. 406; 49 L. J. Ch. 465, C. A.

(*x*) 15 Geo. 5, c. 20.

(*y*) *I.e.*, as his agent, see *Re Cousin's Trusts* (1886), 31 Ch. D. 671; 55 L. J. Ch. 662; *Meyer v. Charters* (1918), 34 T. L. R. 589.

(*z*) See *Marfield v. Burton* (1873), L. R. 17 Eq. 15; 43 L. J. Ch. 46.

Sect. 5.—*Rights of Principal in Respect of Property Intrusted to Agent.*

Article 111.

RIGHT TO FOLLOW PROPERTY INTO HANDS OF THIRD PERSONS.

Subject to the provisions of Articles 82, and 84 to 88, where an agent disposes of the money or property of his principal in a manner not authorised by him, the principal is entitled, as against the agent and third persons, to recover such money or property, wheresoever it may be found (a).

Illustrations.

1. A authorises B, a stockbroker, to sell certain shares transferable only by deed, and intrusts him with the certificates and a blank transfer of the shares for that purpose. B deposits the blank transfer and certificates with his banker as security for an advance to himself. The banker has no title to the shares as against A (b).

2. An agent fraudulently applies moneys of his principal in the purchase of overdue bills, which he sells to a company. The company has no title to the bills as against the principal, overdue bills not being negotiable instruments (c).

3. A, a solicitor, received rents as agent for his client, and paid them into his own bank to an account headed with the name of the estate. Subsequently, A's private account being overdrawn, he transferred to it the balance of the estate account. Held, that the banker, being aware that A was committing a breach of trust, was liable to repay to the principal the amount so transferred (d). Otherwise, if the banker had no notice that the moneys were trust moneys (e), or had not known that a breach of trust was being committed (f).

(a) Illustrations 1 to 3. *Lang v. Smyth* (1831), 7 Bing. 284; 9 L. J. (o.s.) C. P. 91; *Rimmer v. Webster*, [1902] 2 Ch. 163; 71 L. J. Ch. 561; *Farquharson v. King*, [1902] A. C. 325; 71 L. J. K. B. 667, H. L.; *Gompertz v. Cook* (1904), 20 T. L. R. 106. See also Article 86, Illustrations 4 to 7; Article 88, Illustrations 1, and 3 to 7.

(b) *Fox v. Martin* (1895), 64 L. J. Ch. 473; *Colonial Bank v. Cady* (1890), 15 App. Cas. 267; 60 L. J. Ch. 131, H. L.; *Hutchison v. Colorado Mining Co.*, *Hamill v. Lilley* (1887), 3 T. L. R. 265, C. A.; *France v. Clark* (1884), 26 Ch. D. 257; 53 L. J. Ch. 585, C. A.; *Taylor v. Gt. Indian Ry.* (1859), 28 L. J. Ch. 709; 4 De G. & J. 559.

(c) *Re European Bank, ex p. Oriental Bank* (1870), L. R. 5 Ch. 358; 39 L. J. Ch. 588.

(d) *Bodenham v. Hoskyns* (1852), 21 L. J. Ch. 864; 2 De G. M. & G. 903.

(e) *Union Bank of Australia v. Murray-Aynsley*, [1898] A. C. 693, P. C.

(f) *Shields v. Bank of Ireland*, [1901] 1 Ir. R. 222; *Bank of New South Wales v. Goulburn Valley Butter Factory*, [1902] A. C. 543; 71 L. J. P. C. 112. And see Article 137.

Article 112.

RIGHTS AS AGAINST AGENT'S TRUSTEE IN BANKRUPTCY.

On the bankruptcy of an agent, the principal is entitled, as against the trustee in bankruptcy and creditors of the bankrupt, to all moneys and property held by the bankrupt, and all outstanding debts due to the bankrupt, as his agent, subject to any lien of the bankrupt thereon (*g*). Provided that this principle does not extend to money or goods, or debts due or growing due to the bankrupt in the course of his trade or business, which are, at the commencement of the bankruptcy, in the possession, order, or disposition of the bankrupt in his trade or business (*h*), by the consent and permission of the true owner (*i*), under such circumstances that the bankrupt is the reputed owner thereof (*k*).

Where an agent misapplies the money or property of his principal, the principal is entitled, as against the agent and his trustee in bankruptcy and creditors, to the proceeds of such money or property, of whatsoever nature they may be, provided that they can be clearly traced (*l*).

Where an agent mixes the money or property of his principal with his own, the principal is entitled as against the agent and his trustee in bankruptcy and creditors, to a first charge on the mixed fund or property, or on the proceeds thereof, provided that they can be clearly traced (*m*).

Illustrations.

1. Money is paid to a broker by his principal for application in a particular way. The broker pays the money into his own account at a bank, and becomes bankrupt before applying it as directed. The principal is entitled to the money as against the broker's trustee in bankruptcy (*n*). If, in such a case, the agent has drawn on the account, the principal has a charge on the balance in the banker's hands, the amounts so drawn being deemed to be drawn out of the agent's own moneys, whenever they were paid in (*o*). Where the

(*g*) Illustrations 1 to 7. *Ex p. Kelly* (1879), 11 Ch. D. 306; 48 L. J. Bk. 65; *Farley v. Turner* (1857), 26 L. J. Ch. 710; *Re Cotton, ex p. Cooke* (1913), 57 Sol. Jo. 174; *Barber v. Ringley* (1922), 38 T. L. R. 650. As to the right to books, etc., relating to the principal's affairs, see *Re Burnand, ex p. Wilson*, [1904] 2 K. B. 68; 73 L. J. K. B. 413, C. A.

(*h*) See *Re Jenkinson, ex p. Nottingham Bank* (1885), 15 Q. B. D. 441; 54 L. J. Q. B. 601; *Re Pryce, ex p. Rensburg* (1877), 4 Ch. D. 685; *Brewin v. Short* (1855), 24 L. J. Q. B. 297; 5 E. & B. 227.

(*i*) See *Ex p. Carlow* (1834), 2 Mont. & A. 39; *Smith v. Topping* (1833), 3 L. J. K. B. 47; 5 B. & Ad. 674; *Ex p. Ward, re Couston* (1873), L. R. 8 Ch. 144; 42 L. J. Bk. 17.

(*k*) Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 38. See *Re Fawcus, ex p. Burk* (1876), 3 Ch. D. 795. And see Illustrations 6, 7 and 10.

(*l*) Illustrations 8 to 10. *Hopper v. Conyers* (1866), L. R. 2 Eq. 549.

(*m*) Illustrations 1, 11 and 12. *Re Murray, Dickson v. Murray* (1887), 57 L. T. 223. See also *Re Burge, ex p. Skryme*, [1912] 1 K. B. 393; 81 L. J. K. B. 721.

(*n*) *Re Strachan, ex p. Cooke* (1876), 4 Ch. D. 123; 46 L. J. Bk. 52, C. A.; *Hancock v. Smith* (1889), 41 Ch. D. 456; 58 L. J. Ch. 725, C. A. Comp. *Re Hallett, ex p. Blane*, [1894] 2 Q. B. 237; 63 L. J. Q. B. 573, C. A.; *Re Mawson, ex p. Hardcastle* (1881), 44 L. T. 523; *King v. Hutton*, [1900] 2 Q. B. 504; 69 L. J. Q. B. 786, C. A.; *Wilson and Furness-Leyland Line v. British and Continental Shipping Co.* (1907), 23 T. L. R. 397.

(*o*) *Re Hallett's Estate, Knatchbull v. Hallett* (1880), 13 Ch. D. 696; 49 L. J. Ch. 415, C. A.; *Spartal v. Crédit Lyonnais* (1886), 2 T. L. R. 178, C. A.; *Re Wreford, Carmichael*

moneys of several principals have been paid into the account, their charges have priority in the inverse order of the payments, the balance being deemed to consist of the trust moneys most recently paid in (*p*). Where money has been paid by a client to a stockbroker, as agent, for the purchase of shares, and the broker becomes bankrupt, not having delivered the shares, the client is entitled to the return of the money, if it can be followed, as in a case of fiduciary relationship (*q*).

2. An agent becomes bankrupt, it being a matter of notoriety that he acts as an agent. Goods in his hands for sale (*r*), and unmatured bills and notes received by him as the price of goods sold (*s*), must, subject to his lien, be returned to the principal, and may be recovered by him from the trustee in bankruptcy. The price of goods already sold may, subject to the agent's lien, be recovered by the principal from the purchaser (*t*), and if received by the trustee in bankruptcy, may be recovered from him by the principal as money received to his use (*t*).

3. Bills of Exchange are paid into a bank, to be collected as they fall due, and the proceeds credited to the account of the customer. The banker becomes bankrupt. The customer is entitled, as against the trustee in bankruptcy, to those bills of which the proceeds have not been received by the banker before the bankruptcy, subject to any lien of the banker (*u*); and if the trustee in bankruptcy collect any of the bills, he is liable to the customer for the proceeds or for the value thereof, at the option of the customer (*x*). Otherwise, where the banker discounts the bills, or there is an agreement with the customer that they shall become the property of the banker (*y*). Such an agreement is not, however, to be inferred merely because it is the custom of the banker to credit the amount of the bills as cash immediately they are paid in and to charge interest for the unexpired period (*x*).

4. Bills are remitted to an agent for a particular purpose. They must be

v. Rudkins (1897), 13 T. L. R. 153. And see *Société Coloniale Anversoise v. London and Brazilian Bank*, [1911] 2 K. B. 1024; 80 L. J. K. B. 1361, C. A.

(*p*) *Re Stenning*, [1895] 2 Ch. 433.

(*q*) *Re Wheeler* (1933), 102 L. J. Ch. 341; *Re Wreford* (1897), 13 T. L. R. 153.

(*r*) *Scott v. Surman* (1742), Willes, 400; *Re Wood*, *ex p. Boden* (1873), 28 L. T. 174; *Stafford v. Clark* (1823), 1 C. & P. 24; *Ex p. Dumas* (1754), 1 Atk. 231; *Godfrey v. Furzo* (1733), 3 P. W. 186; *Ex p. Wucherer* (1832), 2 Dea. & Ch. 37; *Ex p. Moldaut* (1833), 3 Dea. & Ch. 351; *Re Kullberg* (1863), 9 L. T. 460.

(*s*) *Scott v. Surman* (1742), Willes, 400; *Whitecomb v. Jacob*, 1 Salk. 160.

(*t*) *Scott v. Surman*, *supra*; *Ex p. Boden* (1873), 28 L. T. 174; *Ex p. Carlow* (1834), 2 Mont. & A. 39; *Burdett v. Willett* (1708), 2 Vern. 638; *Ex p. Moldaut* (1833), 3 Dea. & Ch. 351.

(*u*) *Giles v. Perkins* (1807), 9 East, 12; *Thompson v. Giles* (1824), 3 D. & R. 733; *Ex p. Benson* (1832), 1 Dea. & Ch. 435; *Ex p. Armitstead* (1828), 2 G. & J. 371; *Ex p. Sollers* (1811), 18 Ves. 229; *Ex p. Rowton* (1810), 17 Ves. 426. As to instruments payable on demand, see *Re Mills* (1893), 10 M. B. R. 193.

(*x*) *Tennant v. Strachan* (1829), 4 C. & P. 31; *Giles v. Perkins*, *supra*; *Thompson v. Giles*, *supra*; *Ex p. Bond* (1840), 1 M. D. & De G. 10; *Ex p. Froggatt* (1843), 3 M. D. & De G. 322; *Ex p. Edwards* (1842), 2 M. D. & De G. 625. See also *Re Farrow's Bank*, [1923] 1 Ch. 41; 92 L. J. Ch. 153, C. A.

(*y*) *Giles v. Perkins*, *supra*; *Thompson v. Giles*, *supra*; *Re Gothenburg Commercial Co.* (1881), 44 L. T. 166, C. A.; *Re Broad*, *ex p. Neck* (1884), 13 Q. B. D. 740; 54 L. J. Q. B. 79, C. A.; *Re Harrison*, *ex p. Barkworth* (1858) 27 L. J. Bk. 5; 2 De G. & J. 194; *Carstairs v. Bates* (1812), 3 Camp. 301; *Dawson v. Isle*, [1906] 1 Ch. 633; 75 L. J. Ch. 338.

returned to the remitter, if the agent become bankrupt before applying them to such purpose (z).

5. A foreign merchant remitted bills to a factor in London, with instructions to sell them. The factor sold and indorsed them in his own name, and became bankrupt before receiving the price. Held, that the principal was entitled to the proceeds, as against the trustee in bankruptcy (a).

6. Books are left with a publisher for sale in the course of his trade. The books do not pass to his trustee in bankruptcy (b). So, where an agent was described, on a brass plate at his place of business and on his invoices, as a merchant and manufacturers' agent, that was held to be sufficient notice of the agency to exclude the operation of the reputed ownership clause of the Bankruptcy Act, and the trustee in bankruptcy was ordered to deliver up to the manufacturers goods of theirs in the hands of the agent, and to pay over to them the proceeds of goods which had been sold on their behalf (c).

7. Books are deposited with a bookseller for sale on commission, and are kept by him as part of his general stock. It is notorious in the trade that it is customary for booksellers to act as agents for the sale of books on commission. The books are not in his reputed ownership, and on his bankruptcy must be delivered up to the principal (d). The reputed ownership clause applies only where the moneys or goods are in the possession of, or the debts are owing to, the bankrupt under such circumstances that, in the ordinary course of his business, he would obtain delusive credit thereby (e).

8. A broker misapplied his principal's money by purchasing stock and bullion, and absconded. He was adjudicated bankrupt on the day upon which he received and misapplied the money. On being arrested he surrendered the securities for the stock and bullion to the principal. Held, that the principal was entitled to retain the securities as against the trustee in bankruptcy (f).

9. A factor, who was intrusted with money to buy indigo, applied it partly to the reduction of a mortgage debt and partly in investments which resulted in profits, and subsequently became bankrupt. Held, that the principal was entitled to the surplus produced by a sale of the mortgaged property, and to the profits realised by the investments, as the proceeds of the money misapplied by the factor, so far as it was possible to trace them (g).

(z) *Ex p. Oursell* (1756), Ambl. 297; *Ex p. Smith* (1819), Buck 355; *Ex p. Sayers* (1800), 5 Ves. 169; *Jombart v. Woollett* (1837), 6 L. J. Ch. 211; 2 Myl. & C. 389; *Parke v. Eliason* (1801), 1 East, 544; *Zinck v. Walker* (1777), W. Bl. 1154; *Tooke v. Hollingworth* (1793), 5 T. R. 215.

(a) *Re Trye, ex p. Pauli* (1838), 3 Dea. 169.

(b) *Re Thickbroom, ex p. Greenwood* (1862), 6 L. T. 558.

(c) *Re Smith, ex p. Bright* (1879), 10 Ch. D. 566; 48 L. J. Bk. 81, C. A.

(d) *Whitfield v. Brand* (1847), 16 M. & W. 282; *Ex p. Poppleton* (1891), 63 L. T. 839 (sales sent to an ironmonger on sale or return); *Re Florence, ex p. Wingfield* (1879), 10 Ch. D. 591, C. A. (horses to a horsedealer on sale or return); *Re Ford*, [1929] 1 Ch. 137; 98 L. J. Ch. 144 (antique furniture sent to a dealer for sale on commission).

(e) *Colonial Bank v. Whinney* (1886), 11 App. Cas. 426; 56 L. J. Ch. 43, H. L.; *Re Watson, ex p. Atkin*, [1904] 2 K. B. 753; 73 L. J. K. B. 854, C. A.

(f) *Taylor v. Plumer* (1815), 3 M. & S. 562; *Re Hulton, ex p. Manchester Bank* (1891), 39 W. R. 303. And see *Re Dodds, ex p. Brown* (1891), 60 L. J. Q. B. 599.

(g) *Re Hammond, ex p. Brooke* (1869), 20 L. T. 547.

10. Malting agents sent in to their principal fictitious accounts of barley alleged to have been bought on his account, and misapplied the money. They subsequently absconded, leaving barley and malt on their premises of less value than the amount misapplied, and became bankrupt. The principal seized the malt and barley. Held, that he was entitled to hold it as against the trustee in bankruptcy. It is notorious that malting agents are, in many instances, not the owners of barley and malt on the malting premises, and it was, therefore, not in the order and disposition of the agents as reputed owners; and though much of it was bought with their own money, they were estopped, by their representation that they were buying it with the money intrusted to them by the principal, from saying so, and the trustee in bankruptcy was, in this respect, in no better position (*h*).

11. An agent, who was intrusted with bills to get discounted, mixed them with his own property, absconded, and became bankrupt. He was arrested with money in his possession which was the produce of portions of the mixed property. Held, that the principal was entitled, in preference to the other creditors, to a first charge on such money for the amount of the bills (*i*).

12. An agent, who was employed to sell certain goods, mixed them with goods of his own, and consigned the whole of the goods together to a factor for sale, representing to his principal that he had sold his goods, and debiting himself with the amount of the supposed prices. The agent having become bankrupt, the principal was held entitled to have the proceeds of the mixed property marshalled, so as to throw advances made by the factor, as far as possible, on the agent's own goods (*k*).

Article 113.

PRIVILEGE FROM DISTRESS OF GOODS AND CHATTELS IN HANDS OF AGENT.

Where goods or chattels are intrusted to an agent, who carries on a trade or business in which the public are invited to intrust their goods or chattels to him, for the purpose of being sold or otherwise dealt with in the way of such trade or business, the goods or chattels, while on the premises of the agent, or on other premises hired by him, for any such purpose, are exempt from distress for rent.

Illustrations.

1. Goods are intrusted to a factor or auctioneer for sale. They are not liable to distress for the rent of the premises of the factor or auctioneer (*l*).

(*h*) *Harris v. Truman* (1882), 9 Q. B. D. 264; 51 L. J. Q. B. 338, C. A. And see *Middleton v. Pollock, ex p. Wetherall* (1876), 4 Ch. D. 49; 46 L. J. Ch. 39.

(*i*) *Frith v. Cartland* (1865), 34 L. J. Ch. 301.

(*k*) *Broadbent v. Barlow* (1861), 30 L. J. Ch. 569; 3 De G. F. & J. 570; *Re Holland, ex p. Alston* (1868), L. R. 4 Ch. 168.

(*l*) *Williams v. Holmes* (1853), 8 Ex. 861; 22 L. J. Ex. 283; *Adams v. Grane* (1833), 1 C. & M. 390; *Gilman v. Elton* (1831), 6 Moo. 243; *Findon v. McLaren* (1845), 6 Q. B. 891; 14 L. J. Q. B. 183.

2. Corn is intrusted to a factor for sale. Not having a warehouse of his own, he deposits the corn in the warehouse of a granary keeper. The corn is privileged from distress for the rent of such warehouse (*m*).

3. An auctioneer hires a room for the purpose of a sale by auction. Goods or chattels sent to the room for sale are privileged from distress, though the room was hired only for the particular occasion (*n*).

4. A employs an auctioneer to sell goods by auction on A's premises. B sends goods to A's premises, to be sold with A's goods. The goods of both A and B are liable to distress for rent due from A in respect of the premises (*o*).

5. A was an agent for the sale of carpets manufactured by B, and the name of B, as well as that of A, was painted outside the premises upon which A carried on business. A also acted as agent for the sale, upon the same premises, of carpets manufactured by C, and was entitled to carry on other agency business, though he did not do so. Held, that the goods of B and C were not exempt from distress for the rent of the premises, because A did not carry on a trade or business in which the public were invited to intrust their goods to him (*p*).

Sect. 6.—*Bribery of Agent.*

Article 114.

RIGHTS OF PRINCIPAL WHERE AGENT BRIBED.

Where an agent is induced by bribery to depart from his duty to his principal, the person who bribed the agent is liable, jointly and severally with the agent, to the principal for any loss incurred by him in consequence of the breach of duty, without taking into account the amount of the bribe, or any part thereof that may have been recovered by the principal from the agent as money received to his use (*q*).

Every contract made or act done by an agent under the influence of bribery, or (to the knowledge of the other contracting party) in violation of his duty to his principal, is voidable by the principal (*r*).

(*m*) *Matthias v. Mesnard* (1826), 2 C. & P. 353.

(*n*) *Brown v. Arundell* (1850), 20 L. J. C. P. 30; 10 C. B. 54.

(*o*) *Lyons v. Elliott* (1876), 1 Q. B. D. 210; 45 L. J. Q. B. 159.

(*p*) *Tapling v. Weston* (1883), 1 C. & E. 99.

(*q*) Illustration 1. *Morgan v. Elford* (1876), 4 Ch. D. 352; *Alexander v. Webber*, [1922] 1 K. B. 642; 91 L. J. K. B. 320; *Jasperson v. Dominion Tobacco Co.*, [1923] A. C. 709; 92 L. J. P. C. 190, P. C. As to the criminal liability of agents and of persons bribing agents, see Article 60.

(*r*) Illustrations 2 to 4. *Panama Telegraph Co. v. India Rubber, etc., Co.* (1875), L. R. 10 Ch. 515; 45 L. J. Ch. 121; *Odessa Tramways Co. v. Mendel* (1877), 8 Ch. D. 235; 47 L. J. Ch. 505, C. A.; *Matthews v. Gibbs* (1860), 30 L. J. Q. B. 55; *Maxwell v. Port Tennant Fuel Co.* (1857), 24 Beav. 495; *Bartram v. Lloyd* (1904), 90 L. T. 357, C. A.; *Rowland v. Chapman* (1901), 17 T. L. R. 669; *Re A Debtor*, [1927] 2 Ch. 369; 96 L. J. Ch. 381, C. A. The principal may avoid the contract upon discovering the bribery, notwithstanding that he has previously, in ignorance of the bribery, repudiated the contract upon insufficient grounds; *Alexander v. Webber, supra*.

An agent who has been bribed is conclusively presumed to be influenced by the bribery in doing any act affecting the relations between his principal and the briber (s).

Illustrations.

1. An agent contracted, on behalf of a corporation, for a supply of coals, the persons with whom he contracted making him an allowance of 1s. per ton, and charging 1s. per ton more than the market price, to enable them to make the allowance. The corporation, on discovering the bribery, sued the persons who supplied the coals for the amount so overcharged. Held, that the defendants were liable, and that the fact that the agent had deposited with the corporation the amount of the bribe, and the corporation had agreed to allow him what was recovered from the defendants, constituted no defence (t).

2. A person who dealt with an agent gave him a gratuity in order to influence him, generally, in favour of the giver. The agent was in fact so influenced in making a contract with the giver on the principal's behalf. Held, that the contract was voidable by the principal, although the gratuity was not given in direct relation to the particular contract (u).

3. A agreed to buy a pair of horses from B, provided A's agent certified that they were sound. B secretly offered the agent a certain sum if the horses were sold, and the agent accepted the offer. The agent certified that the horses were sound. Held, that A was not bound by the contract, whether the agent was in fact biased by the offer made to and accepted by him, or not (x).

4. A broker, who was employed to sell certain property, sold it, ostensibly to A, really to A and himself. Both A and the broker became insolvent, the goods still being in the broker's possession. Held, that the contract was voidable, and that the principal was entitled to recover the goods as against the broker's trustee in bankruptcy (y).

(s) Illustration 3. *Hovenden v. Millhoff* (1900), 83 L. T. 41, C. A. But see *Rowland v. Chapman* (1901), 17 T. L. R. 669.

(t) *Salford Corporation v. Lever*, [1891] 1 Q. B. 168; 60 L. J. Q. B. 39, C. A.; *Grant v. Gold Exploration, etc., Syndicate*, [1900] 1 Q. B. 233; 69 L. J. Q. B. 150, C. A.; *Hovenden v. Millhoff* (1900), 83 L. T. 41, C. A. Comp. *Lands Allotment Co. v. Broad* (1895), 13 R. 699.

(u) *Smith v. Sorby* (1875), 3 Q. B. D. 522, n.; *Hough v. Bolton* (1885), 1 T. L. R. 606.

(x) *Shipway v. Broadwood*, [1899] 1 Q. B. 369; 68 L. J. Q. B. 360, C. A.

(y) *Re Pemberton, ex p. Huth* (1840), Mont. & Ch. 667.

CHAPTER XII.

RELATIONS BETWEEN AGENTS AND THIRD PERSONS.

Sect. 1.—*Liabilities of Agents in Respect of Contracts Made by them.*

Article 115.

PUBLIC AGENTS NOT LIABLE ON CONTRACTS MADE AS SUCH.

AT common law, a public agent is not liable to be sued on any contract made by him on behalf of the Crown or government (a); but he is personally liable where he expressly pledges his personal credit (b), or where he contracts otherwise than as an agent of the Crown or government (b); and various statutes have provided that certain public agents may be sued in respect of certain matters (c).

Illustrations.

1. A colonial governor who orders goods which are supplied and debited to the government is not liable on the contract (d).

2. Orders were given for forage to be supplied to a troop, by a clerk who was appointed by the captain of the troop. Held, that the captain was not liable for the price of the forage (e).

3. A naval commander, when employing a cook, undertook to pay him a certain sum per annum in addition to the government pay. Held, that the commander was personally liable to pay such additional sum, he having contracted personally, and not as an agent for the government (f).

4. A clerk of a county court gave orders for the fitting up, etc., of the court-house. Held, that it was properly left to the jury to say whether he had contracted personally, and that, if he had, he was personally liable on the contract (g).

5. The Commissioners of Public Works and Buildings entered into a contract with certain builders for the erection of public buildings. It was

(a) Illustrations 1 and 2. *Palmer v. Hutchinson* (1881), 6 App. Cas. 619; 50 L. J. P. C. 62, P. C.; *Prosser v. Allen* (1819), Gow. 117. Nor is he liable upon an implied warranty of authority: *Dunn v. Macdonald*, [1897] 1 Q. B. 555; 66 L. J. Q. B. 420, C. A. The remedy upon the contract is by petition of right: see Article 90. The rule as to immunity from suit of public agents probably applies even where the contract is under seal, provided that it is expressed to be made on behalf of the Government: *Unwin v. Wolseley* (1787), 1 T. R. 674. See *contra*: *Cunningham v. Collier* (1785), 4 Doug. 233.

(b) Illustrations 3 to 5. *Prosser v. Allen* (1819), Gow. 117.

(d) *Macbeath v. Haldimand* (1786), 1 T. R. 172; *Kenny v. Cosgrave*, [1926] Ir. R. 517.

(e) *Rice v. Chute* (1801), 1 East, 579.

(f) *Clutterbuck v. Coffin* (1842), 11 L. J. C. P. 65; 3 M. & G. 842.

(g) *Auty v. Hutchinson* (1848), 17 L. J. C. P. 304; 6 C. B. 266.

held that the Commissioners must be taken to have contracted for themselves, and not merely as agents of the Crown, and that they were liable to be sued by the builders for damages for breach of the contract (*h*).

6. By the War Department Stores Act, 1867 (*i*), s. 20, the Secretary of State for War, whose successor in this respect is the Minister of Supply (*k*), may institute and prosecute any action, suit, or proceeding, . . . concerning . . . any stores sold or contracted to be delivered to or by (him) for the use or on account of His Majesty . . . and may defend any action suit or proceeding concerning any such stores. The Minister of Supply is liable in an action for damages for breach of a contract made by him in relation to such stores (*l*). By the Ministry of Health Act, 1919 (*m*), s. 7 (1), the Minister of Health may sue and be sued in that name (*n*); and by the Ministry of Transport Act, 1919 (*o*), s. 26 (1), the Minister of Transport may sue and be sued in respect of matters, whether relating to contract tort or otherwise in connection with his office, by the name of the Minister of Transport, and may for all purposes be described by that name and shall be responsible for the acts and defaults of the officers and servants and agents of the Ministry in like manner and to the like extent as if they were servants. By the Air Force (Constitution) Act, 1917 (*p*), s. 10, the Air Council may sue and be sued by that name (*q*). A similar provision is applied to the Board of Education by the Board of Education Act, 1899 (*r*), s. 6; and to the Minister of Pensions, by the Ministry of Pensions Act, 1916 (*s*), s. 6 (1). It seems that the effect of such provisions is to clothe the public agent with the rights and obligations of a principal, so that he can enforce rights and remedies by the ordinary process of litigation, and the subject may sue him as though he were himself a contracting party and not the agent of the Crown (*t*).

Article 116.

AGENT LIABLE IF HE CONTRACT PERSONALLY, BUT NOT IF HE CONTRACT MERELY AS AN AGENT.

Every agent who contracts personally, though also on behalf of his principal, is personally liable, and may be sued in his

(*h*) *Graham v. Public Works Commrs.*, [1901] 2 K. B. 781; 20 L. J. K. B. 860; *Roper v. Public Works Commrs.*, [1915] 1 K. B. 45; 84 L. J. K. B. 219. The Commissioners are not liable to be sued in tort: *ibid.*; and the Statutes of Limitation do not run against them: *Public Works Commrs. v. Pontypridd Masonic Hall Co.*, [1920] 2 K. B. 233; 89 L. J. K. B. 607.

(*i*) 30 & 31 Vict. c. 128.

(*k*) Ministry of Supply Act, 1939 (2 & 3 Geo. 6, c. 38), s. 3; Ministry of Supply (Transfer of Powers) (No. 1) Order, 1939 (S. R. & O., 1939, No. 877).

(*l*) *Minister of Supply v. British Thomson-Houston Co., Ltd.*, [1943] 1 K. B. 478; 112 L. J. K. B. 520, C. A. See also *Williams v. Admiralty (Lords Commissioners)* (1851), 11 C. B. 420; 20 L. J. C. P. 245.

(*m*) 9 & 10 Geo. 5, c. 21.

(*n*) *Gilleghan v. Minister of Health*, [1932] 1 Ch. 86; 101 L. J. Ch. 81 (which decided that an action would not lie against him) has been overruled by *Minister of Supply v. British Thomson-Houston*, *supra*.

(*o*) 9 & 10 Geo. 5, c. 50.

(*p*) 7 & 8 Geo. 5, c. 51.

(*q*) The Air Council is thus liable to suit by action: *Minister of Supply v. British Thomson-Houston*, *supra*; and the two cases of *Rowland v. Air Council* ((1923), 29 T. L. R. 228, 455, C. A.; (1927), 96 L. J. Ch. 470, C. A.) should not be regarded as authorities to the contrary (*ibid.*).

(*r*) 62 & 63 Vict. c. 33.

(*s*) 6 & 7 Geo. 5, c. 65.

(*t*) See *Minister of Supply v. British Thomson-Houston*, *supra*, per Goddard, L.J., at p. 490.

own name, on the contract, whether the principal be named therein, or be known to the other contracting party, or not (*u*), unless the other contracting party elect to give exclusive credit to the principal (*x*). But no agent is personally liable on any contract made by him merely in his capacity of an agent, even if he make it fraudulently, knowing that he has not authority to do so (*y*).

The question whether an agent who has made a contract on behalf of his principal is to be deemed to have contracted personally, and if so, the extent of his liability on the contract (*z*), depend on the intention of the parties to be deduced from the nature and terms of the particular contract and the surrounding circumstances (*a*) including any binding custom (*b*).

Where a home agent contracts in England or Wales, on behalf of a foreign principal, he is presumed to contract personally, unless a contrary intention plainly appear from the terms of the contract or the surrounding circumstances (*c*).

Illustrations.

1. A acted as the London agent of C & Co., who were paper manufacturers in Vienna. B, by letter, ordered paper from A, who in his own name acknowledged the letter, and promised to supply the paper in certain quantities at certain times. A portion of the paper was delivered, and on B complaining to A respecting the non-delivery of the remainder, A stated that it was the default of C & Co. B then wrote to C & Co. telling them of the position of affairs, and the excuses made by A. Subsequently B sued A for breach of contract. Held, that A, having contracted personally, was liable, and that B's letter to C & Co. did not amount to an election by B to substitute C & Co. for A as the contracting parties. Some weight was attached to the circumstance that the principals were foreigners (*d*).

2. A solicitor in his own name contracted to buy certain freehold property. Held, that he was personally liable, although he was, in fact, acting on behalf

(*u*) Illustrations 1 to 13. *Reid v. Dreaper* (1861), 30 L. J. Ex. 268; 6 H. & N. 813; *Turrel v. Collet* (1795), 1 Esp. 320; *Watson v. Murrel* (1824), 1 C. & P. 307; *Sciuce v. Whittington* (1823), 3 D. & R. 195. In such cases, either the principal or the agent may be sued. A director or officer who enters into a written contract on behalf of a limited company is personally liable on the contract if it does not contain the name of the company together with the word "limited," as required by the Companies Act, 1929 (19 & 20 Geo. 5, c. 23), ss. 2, 328. See *Dermatine Co. v. Ashworth* (1905), 21 T. L. R. 510.

(*x*) See *Ex p. Pitt* (1923), 40 T. L. R. 5, C. A.; *Gardiner v. Heading*, [1928] 2 K. B. 284; 97 L. J. K. B. 766, C. A.

(*y*) Illustrations 5, 14 to 16. *Wilson v. Bury* (1880), 5 Q. B. D. 518; 50 L. J. Q. B. 90, C. A.; *Russel v. Reece* (1847), 2 C. & K. 669. He may be liable on an implied warranty of authority, see Article 123.

(*z*) Illustrations 11 and 17.

(*a*) Illustrations 1 to 14; and see Articles 117 to 124.

(*b*) *Thornton v. Fehr* (1935), 51 Ll. L. Rep. 330.

(*c*) *Hutton v. Bulloch* (1874), L. R. 9 Q. B. 572, Ex. Ch.; *Dramburg v. Pollitzer* (1873), 28 L. T. 470; *Elbinger, etc. v. Claye* (1873), L. R. 8 Q. B. 313; 42 L. J. Q. B. 151; *Reynolds v. Peapes* (1890), 6 T. L. R. 49; *Peterson v. Ayre* (1853), 13 C. B. 353; *Harper v. Keller* (1915), 84 L. J. K. B. 1696; *Brandt v. Morris*, [1917] 2 K. B. 784, C. A. See Article 119 for rules of construction, where the contract is in writing.

(*d*) *Dramburg v. Pollitzer* (1873), 28 L. T. 470.

of a client (e). So, where a solicitor bought property at a sale by auction, he was held personally liable for the deposit, though he openly declared that he was bidding as trustee for a client (f). Where solicitors instructed stock-brokers to sell stock belonging to A, and enclosed a blank transfer signed by A, it was held that the instructions to sell were given by the solicitors as principals (g).

3. An agent signed in his own name, without mentioning his principal, an undertaking to accept shares in a company, and the shares were allotted to him. Subsequently, the principal took a larger number of shares, in satisfaction, as the agent said, of his undertaking. Held, that the agent, having personally accepted the shares, was liable as a contributory (h).

4. An agent buys goods at a sale by auction, and gives his own name, which is entered as that of the buyer. He is personally liable, unless it be clearly proved that he did not intend to bind himself, and that the auctioneer knew that (i).

5. An agent verbally orders goods on behalf of his principal. He is personally liable, unless the seller knows that he is contracting merely as an agent (k). But he is not liable if he order the goods in the principal's name, and credit is given to the principal, or if he tell the seller that he does not intend to be personally responsible (l).

6. A broker sent a contract note in his own name, and afterwards a corrected one in the name of the principal, the buyer receiving both notes together. Held, that it was a question for the jury whether he intentionally sent the first contract note in his own name, or sent it merely by mistake, and that if he sent it intentionally, he could not, having contracted personally, afterwards discharge himself by setting up the agency, even if he were known to be a broker when he made the contract (m).

7. A and B, on behalf of themselves and other members of a club, order supplies for the use of the club. A and B are personally liable on the contract, and it is not necessary to join the other members as defendants (n).

8. A bill of lading whereby goods are deliverable to "the consignee or his assigns, he or they paying freight," is indorsed by the consignee to his agent for sale. The agent takes delivery under the bill of lading as assignee thereof, sells the goods, and pays the proceeds to his principal. The agent is personally liable on an implied contract to pay the freight (o).

(e) *Saxon v. Blake* (1861), 29 Beav. 438.

(f) *Hobhouse v. Hamilton* (1826), 1 Hog. 401, Ir.

(g) *Hitchens v. Jackson*, [1943] A. C. 266, cited *ante*, p. 192.

(h) *Ex p. Bird* (1864), 33 L. J. Bk. 49; 4 De G. J. & S. 200.

(i) *Williamson v. Barton* (1862), 31 L. J. Ex. 170; 7 H. & N. 899; *Chadwick v. Maden* (1851), 9 Hare, 188.

(k) *Seaber v. Hawkes* (1831), 5 M. & P. 549.

(l) *Ex p. Hartop* (1806), 12 Ves. 352; *Johnson v. Ogilby* (1734), 3 P. Wms. 277; *Owen v. Gooch* (1797), 2 Esp. 567; *Bonfield v. Smith* (1844), 12 M. & W. 405.

(m) *Magee v. Atkinson* (1837), 2 M. & W. 440; 6 L. J. Ex. 115.

(n) *Cullen v. Queensbury* (1781), 1 Bro. P. C. 396, H. L.; and see *Bradley Egg Farm, Ltd. v. Clifford*, [1943] 2 A. E. R. 378, C. A., cited *ante*, p. 19.

(o) *Bell v. Kymer* (1814), 5 Taunt. 477; *Dougal v. Kemble* (1826), 3 Bing. 383. Comp. *Amos v. Temperley* (1841), 8 M. & W. 798; *Wilson v. Kymer* (1813), 1 M. & S. 157; *Ward v. Felton* (1801), 1 East, 407; *Steel v. Houlder* (1887), 3 T. L. R. 300, C. A.

9. A broker sells debentures in his own name without disclosing his principal, and sends to the buyer what purports to be a transfer signed by the principal and two other persons. The names of the two other persons were forged by the principal, and they compel the buyer to give up the debentures. The broker is personally liable to repay to the buyer the sum paid by him for the debentures (*p*).

10. A stockbroker, being instructed to sell shares, and being unable to sell them on the Stock Exchange, sold them outside to an infant, and made out bought and sold notes, acting for both buyer and seller. The shares were sold subject to the rules of the Stock Exchange. It was held that, the transferee being an infant, the broker was liable to indemnify the seller against all liability in respect of the shares. By the rules of the Stock Exchange a buying broker is personally liable to the seller if he fail to give the name of a responsible transferee, and the fact that he acts for both buyer and seller does not affect this liability (*q*).

Auctioneers.

11. Where an auctioneer sells property by auction, the nature and extent of his contract with the purchaser depend upon the conditions of sale, the nature of the subject-matter, and the other surrounding circumstances (*r*). Thus, in the case of a sale of standing corn with straw, to be removed at the purchaser's expense, it was held that the auctioneer contracted to give proper authority to enter and carry away the corn and straw, and undertook that he was in fact authorised to sell, but that he did not warrant the title (*r*). Upon a sale of shares, which required transfer by deed, the auctioneers, who were acting on behalf of an unnamed principal, were held liable in damages, for failing to procure a transfer of the shares, upon the ground that they had agreed so to do (*s*). Where, however, an auctioneer sells a specific chattel by auction, he is not liable upon the contract of sale, nor does he impliedly warrant the title of his principal, although the name of the principal has not been disclosed to the buyer (*t*). In such a case, he impliedly warrants that he has authority to sell and that he knows of no defect in the title of his principal; and he undertakes to deliver the chattel in exchange for the price (for which he may sue); but his contract with the buyer is independent of the contract of sale, which he makes on behalf of the seller and to which he is not a party (*t*).

12. An auctioneer sold goods on behalf of a disclosed principal, the conditions of sale providing that the lots should be cleared within three days, and that if from any cause the auctioneer was unable to deliver, etc., the purchaser should accept compensation. Held, that the auctioneer, being in

(*p*) *Royal Exchange Ass. v. Moore* (1863), 8 L. T. 242; *Gurney v. Womersley* (1854), 24 L. J. Q. B. 46; 4 E. & B. 133.

(*q*) *Queensland Investment Co. v. O'Connell* (1896), 12 T. L. R. 502.

(*r*) *Wood v. Baxter* (1883), 49 L. T. 45.

(*s*) *Franklyn v. Lamond* (1847), 4 C. B. 637; 16 L. J. C. P. 221; *Hanson v. Roberdeau* 1792), 1 Peake, 163.

(*t*) *Benton v. Campbell*, [1925] 2 K. B. 410; 94 L. J. K. B. 881.

possession of the goods, and having contracted to deliver, was personally liable to the purchaser for non-delivery (u).

Where a sale by auction is advertised as being "without reserve," the auctioneer impliedly contracts to accept the offer of the highest *bona fide* bidder, and is liable to him in damages for breach of such implied contract if he accept a bid from the vendor (x). But an advertisement to the effect that certain goods will be sold on certain days does not amount to a contract to so sell them, so as to entitle a person who acts on the advertisement to recover damages for loss of time or expenses if the goods are not put up (y).

13. *Shipmasters*.—A shipmaster signs a bill of lading, and by mistake delivers the wrong goods to the consignee. He is personally liable in an action for not delivering the goods pursuant to the bill of lading (z). So, a shipmaster is personally liable to the seamen for their wages (a).

Not Liable if he Contract Merely as an Agent.

14. A solicitor is *prima facie* not personally liable for the expenses of skilled or other witnesses retained or subpoenaed by him (b). Nor is he personally liable for sheriff's fees merely because, in the course of his duty, he lodges a writ at the sheriff's office for execution (c). In such matters he is deemed to act merely as the agent of his client, unless he expressly pledges his personal credit (c). But a solicitor who employs a particular bailiff to levy execution is *prima facie* personally liable to such bailiff for the fees, it being the usual course of business for the solicitor to pledge his personal credit in such a case (d).

15. A married woman living with her husband, and having no separate property, orders necessaries, with the authority of her husband, nothing being said by her, and no enquiries being made by the tradesman, as to whether she is pledging her husband's credit, or contracting on her own behalf. She must be taken to have contracted as the agent of her husband, and is not personally liable (e).

16. A professes to contract as an agent for B, the terms of the contract being such as to exclude any supposition of an intention by A to be personally

(u) *Woolfe v. Horne* (1877), 2 Q. B. D. 355; 46 L. J. Q. B. 534; *Williams v. Millington* (1788), 1 H. Bl. 81.

(x) *Warlow v. Harrison* (1858), 1 El. & El. 295, 309; 29 L. J. Q. B. 14, Ex. Ch.; *Heatley v. Newton* (1881), 19 Ch. D. 326; 51 L. J. Ch. 225, C. A. Comp. *Mainprice v. Westley* (1865), 34 L. J. Q. B. 229; 6 B. & S. 420; *Rainbow v. Hawkins*, [1904] 2 K. B. 322; 73 L. J. K. B. 641; *McManus v. Fortescue*, [1907] 2 K. B. 1; 76 L. J. K. B. 393, C. A.

(y) *Harris v. Nickerson* (1873), L. R. 8 Q. B. 286; 42 L. J. Q. B. 171.

(z) *Bradley v. Dunipace* (1862), 32 L. J. Ex. 22, Ex. Ch. But see *Parsons v. New Zealand Shipping Co.*, [1901] 1 K. B. 548; 70 L. J. K. B. 404.

(a) *The Salacia* (1863), 32 L. J. Adm. 41; *Buck v. Rawlinson* (1704), 1 Bro. P. C. 137. As to his liability for repairs, etc., ordered by him, see *Essery v. Cobb* (1832), 5 C. & P. 358.

(b) *Robins v. Bridge* (1837), 7 L. J. Ex. 49; 3 M. & W. 114; *Lee v. Everest* (1857), 26 L. J. Ex. 334; 2 H. & N. 285. And see *Wakefield v. Duckworth*, [1915] 1 K. B. 218; 84 L. J. K. B. 335 (order for photographs to be used in connection with a trial).

(c) *Royle v. Busby* (1880), 6 Q. B. D. 171; 50 L. J. Q. B. 196, C. A.; following *Maybery v. Mansfield* (1846), 9 Q. B. 754; *Seal v. Hudson* (1847), 4 D. & L. 760, and overruling *Brewer v. Jones*, 10 Ex. 655.

(d) *Newton v. Chambers* (1844), 13 L. J. Q. B. 141; 1 D. & L. 869; *Maile v. Mann* (1848), 2 Ex. 608; *Langridge v. Lynch* (1876), 34 L. T. 695.

(e) *Paguin v. Beauclerk*, [1906] A. C. 148; 75 L. J. K. B. 395, H. L.

liable. A is not liable on the contract, even if he made it fraudulently, knowing that he had no authority from B (f), unless he is shown to be the real principal (g); but he may be liable for breach of an implied warranty that he had B's authority to make the contract (h).

Liability may be Expressly Limited.

17. Where an agent contracts personally, his liability under the contract may be expressly restricted to certain events. Thus where a clause in a charterparty provided that the liability of the agent as to all matters—as well before as after the shipping of the cargo—should cease as soon as the cargo was shipped, it was held that he was not personally liable for demurrage at the port of discharge (i).

Article 117.

LIABILITY ON CONTRACTS UNDER SEAL.

Where an agent is a party to a deed and executes it in his own name, he is personally liable thereon, even when he is described in the deed as acting for and on behalf of a named principal.

Illustrations.

1. A, on behalf of B, contracted by deed to purchase certain houses, and covenanted that he (A) would pay £800 for them. The houses were destroyed. Held, that A was personally liable to pay the £800, although he had no effects in his hands belonging to B (k). If A covenanted under his own hand and seal for the act of B, A is personally liable, though he describe himself as covenanting for and on behalf of B (l).

2. The directors of a company contracted by deed to purchase a mine, the price to be paid in twelve months out of moneys raised by the company, with a proviso that if the directors should not by that time have received sufficient deposits from shareholders, etc., to enable them to pay, they should be allowed a further six months for payment. And the directors covenanted that they would, "out of the said payments so to be made by subscribers or shareholders in the said company," pay, according to the terms specified and subject to the said proviso. Held, that they were personally liable for the price, at the end of the eighteen months (m).

3. A mortgagee by deed contracted for a tenancy of the mortgaged property, the contract being expressed to be made between the mortgagee

(f) *Lewis v. Nicholson* (1852), 18 Q. B. 503; 21 L. J. Q. B. 311; 88 R. R. 683; *Jenkins v. Hutchinson* (1849), 13 Q. B. 744; 18 L. J. Q. B. 274.

(g) See Article 123.

(h) See Article 125.

(i) *Oglesby v. Yglesias* (1858), 27 L. J. Q. B. 356; E. B. & E. 930; *Milvan v. Perez* (1861), 30 L. J. Q. B. 90; 3 E. & E. 495. Comp. *Christoffersen v. Hansen* (1872), L. R. 7 Q. B. 509; 41 L. J. Q. B. 217; *Lister v. Van Haansbergen* (1876), 1 Q. B. D. 269; 45 L. J. Q. B. 495; *Gullischen v. Stewart* (1884), 13 Q. B. D. 317; 53 L. J. Q. B. 173, C. A.; *Clink v. Radford*, [1891] 1 Q. B. 625; 60 L. J. Q. B. 338, C. A.

(k) *Cass v. Rudele* (1692) 2 Vern. 280, H. L.

(l) *Appleton v. Binks* (1804), 5 East, 148.

(m) *Hancock v. Hodgson* (1827), 12 Moore, 504.

“as agent, hereinafter called the landlord,” and the tenant. Held, that it was a question of construction who was the lessor, and on the true construction the contract was that of the mortgagee, and that the mere use of the words “as agent” was not sufficient to prevent the demise operating on the legal estate of the mortgagee (*n*).

Article 118.

LIABILITY ON BILLS OF EXCHANGE, PROMISSORY NOTES AND CHEQUES.

No agent is personally liable on any bill of exchange, promissory note, or cheque, unless his name appear thereon (*o*).

- (a) Where a bill of exchange is drawn on an agent in his own name and is signed by him, he is personally liable as acceptor, even if he add words to the signature, indicating that he signs for and on behalf of a principal, or as an agent (*p*).
- (b) Where a bill of exchange is drawn on a principal, the agent is not liable as acceptor, even if he sign his own name without qualification (*q*).
- (c) Where an agent signs a bill of exchange, promissory note, or cheque otherwise than as acceptor of a bill of exchange, he is personally liable, unless he qualify the signature by adding words thereto, indicating that he signs for and on behalf of a principal, or as an agent. If he so qualify the signature, he is not personally liable (*r*).

The mere addition to the name or signature of an agent on a bill of exchange, promissory note, or cheque, of words describing him as an agent, does not exempt him from personal liability on the instrument, whether the principal is named therein or not (*s*).

Illustrations.

Liability as Acceptors.

1. A bill was drawn on W. Charles, who wrote across it “Accepted, for the Company; W. Charles, purser.” Held, that W. Charles was personally liable as acceptor (*t*).

(*n*) *Chapman v. Smith*, [1907] 2 Ch. 97; 76 L. J. Ch. 394.

(*o*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 23. Where he signs in a trade or assumed name he is liable as if he had signed in his own name; and the signature of the name of a firm is equivalent to the signature of all persons liable as partners: *ibid*.

(*p*) Illustrations 1 and 2. Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 28; *Herald v. Connah* (1876), 34 L. T. 885; *Thomas v. Bishop* (1743), 2 Str. 955.

(*q*) Illustration 3. Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26; *Polhill v. Walter* (1832), 3 B. & Ad. 114.

(*r*) Illustrations 4 to 11. Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 (1); *Ex p. Buckley* (1845), 14 M. & W. 469.

(*s*) Illustrations 2, 7 to 9. Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26 (1); *Landes v. Marcus* (1909), 25 T. L. R. 478.

(*t*) *Mare v. Charles* (1856), 25 L. J. Q. B. 119; 5 E. & B. 978.

2. A bill was directed to "Messrs. J. and S., joint managers of R. M. M. A. Association," and was accepted "J. J., W. S., as joint managers of R. M. M. A. Association." Held, that J. J. and W. S. were personally liable as acceptors, because, though they were described as agents, the bill was drawn on them personally (u). So, where a bill was directed "A B, purser, W. D. Mining Company," and was accepted "A B, *per proc.* W. D. Mining Company," A B was held personally liable as acceptor (x).

3. A bill is directed to a company, and is accepted by the directors in their own names, without qualification. The directors are not liable as acceptors (y).

Liability as Drawer or Indorser.

4. An agent draws a bill in his own name. He is personally liable as drawer, even to a holder who knows that he is merely an agent, unless words are added to the signature, indicating that he signs merely as an agent (z).

5. A shipmaster draws a bill on his owners in payment for necessities, the bill concluding with the words "value received in 300 tons coal and disbursements . . . supplied to my vessel to enable her to complete her voyage . . . for which I hold my vessel, owners and freight responsible." The master is personally liable as drawer, there being nothing in the concluding words excluding such liability (a).

6. An agent draws a bill in the name of his principal. The agent is not liable on the bill as drawer (b).

7. An agent is under an obligation, as such, to indorse a bill. He may indorse it in such terms as to negative personal liability (c), but merely describing himself as an agent for a named principal is not sufficient for that purpose (c).

Promissory Notes.

8. The trustees of a building society were held personally liable on a promissory note in the following terms: "On demand, we promise to pay A B £200 for the S G Provident Building Society"; (signed) "C D, E F, G H, trustees, I J, secretary" (d).

9. Directors have been held personally liable on promissory notes in the following forms:—

- (a) "We, directors of A B Company, Limited, do promise to pay J D, etc."; sealed and signed by four directors without qualification (e).

(u) *Jones v. Jackson* (1870), 22 L. T. 828.

(x) *Nicholls v. Diamond* (1853), 9 Ex. 154; 34 L. J. Ex. 1.

(y) *Okell v. Charles* (1876), 34 L. T. 822, C. A.; *Dermatine Co. v. Ashworth* (1905), 21 T. L. R. 510.

(z) *Leadbitter v. Farrow* (1816), 5 M. & S. 345; *Sowerby v. Butcher* (1834), 4 Tyr. 320; *Kettle v. Dunster* (1927), 43 T. L. R. 770.

(a) *The Elmville, Ceylon Coaling Co. v. Goodrich*, [1904] P. 319; 73 L. J. P. 104.

(b) *Wilson v. Barthrop* (1837), 2 M. & W. 863.

(c) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 26(1). *Elliott v. Bax-Ironside*, [1925] 2 K. B. 301; 94 L. J. K. B. 807. And the section has no application where the indorser merely signs his name: *Britannia Electric Lamp Works, Ltd. v. Mander & Co., Ltd.*, [1939] 2 K. B. 129; 108 L. J. K. B. 823.

(d) *Allan v. Miller* (1870), 22 L. T. 825; *Price v. Taylor* (1860), 29 L. J. Ex. 331; 5 H. & N. 540.

(e) *Dutton v. Marsh* (1871), L. R. 6 Q. B. 361; 40 L. J. Q. B. 175; *Courtauld v. Saunders* (1867), 16 L. T. 562.

- (b) "We, directors of A B Company, for ourselves and other shareholders of the company, jointly and severally promise to pay, etc., on account of the company"; signed without qualification (f).
- (c) "We jointly and severally promise, etc., for and on behalf of, etc." Jointly and severally is equivalent to jointly and personally (g).
- (d) "We jointly promise to pay J F, etc."; signed by directors without qualification (h).

10. The secretary of a company signed a note in the following form:—"I promise to pay, etc."; (signed) "For M T and W Railway Company, J S, secretary." Held, that he was not personally liable (i).

11. A note in the following form was signed by directors, and sealed with the common seal of the society:—"We, two directors of A B Society, by and on behalf of the said society, do hereby promise, etc."; (signed) "C D, E. F, directors." Held, that C D and E F were not personally liable (k). So, where D M, a director, signed an acceptance:—"Accepted . . . D M & Co. Ltd., D M, managing director" (l).

Article 119.

OTHER WRITTEN CONTRACTS.

The question whether the agent is to be deemed to have contracted personally, in the case of a contract in writing other than a bill of exchange, promissory note, or cheque, depends upon the intention of the parties, as appearing from the terms of the written agreement as a whole, the construction whereof is a matter of law for the Court (m)—

- (a) if the contract be signed by the agent in his own name without qualification, he is deemed to have contracted personally, unless a contrary intention plainly appear from other portions of the document (n);
- (b) if the agent add words to his signature, indicating that he signs as an agent, or for or on behalf of a principal, he is deemed not to have contracted personally, unless it

(f) *Penkivil v. Connell* (1850), 5 Ex. 381; 19 L. J. Ex. 305.

(g) *Healey v. Storey* (1848), 3 Ex. 3; 18 L. J. Ex. 8; *Bottomley v. Fisher* (1862), 31 L. J. Ex. 417; 1 H. & C. 211.

(h) *Fox v. Frith* (1842), 10 M. & W. 131; *Gray v. Raper* (1866), L. R. 1 C. P. 694.

(i) *Alexander v. Sizer* (1869), L. R. 4 Ex. 102; 38 L. J. Ex. 59.

(k) *Aggs v. Nicholson* (1856), 1 H. & N. 165; *Lindus v. Melrose* (1858), 27 L. J. Ex. 326; 3 H. & N. 177, Ex. Ch.; *Chapman v. Smethurst*, [1909] 1 K. B. 927; 78 L. J. K. B. 654, C. A.

(l) *Britannia Electric Lamp Works, Ltd. v. Mander & Co., Ltd.*, [1939] 2 K. B. 129; 107 L. J. K. B. 823.

(m) Illustrations 1 to 4. *Spittle v. Lavender* (1821), 5 Moo. 270; 23 R. R. 508; *Bowes v. Shand* (1877), 2 App. Cas. 455; 46 L. J. Q. B. 561.

(n) Illustrations 5 to 8. *Dutton v. Marsh* (1871), L. R. 6 Q. B. 361; 40 L. J. Q. B. 175; *Hick v. Tweedy* (1890), 63 L. T. 765; *Hough v. Manzanos* (1879), 4 Ex. D. 104; 48 L. J. Ex. 398; *Cooke v. Wilson* (1856), 26 L. J. C. P. 15; 1 C. B. (n.s.) 153; *Paice v. Walker* (1870), L. R. 5 Ex. 173; 39 L. J. Ex. 109; *Chadwick v. Maden* (1851), 9 Hare, 188; *Stewart v. Shannessy* (1900), 2 F. 1288; *Beightheil v. Stewart* (1900), 16 T. L. R. 177; *Morley v. Makin* (1906), 54 W. R. 395.

plainly appear from other portions of the document, that, notwithstanding such qualified signature, he intended to bind himself (o);

- (c) the mere fact that the agent is described as an agent, whether by words connected with or forming part of the signature, or in the body of the contract, and whether the principal be named or not, raises no presumption that the agent did not intend to contract personally (p).

This article extends to cases where the contract is made on behalf of a foreign principal (q).

Illustrations.

1. An agent entered into a written agreement to grant a lease of certain premises. He was described in the agreement as making it on behalf of the principal, but in a subsequent portion of the document it was provided that he (the agent) would execute the lease. Held, that the agent was personally liable for a breach of the agreement, though the premises belonged to the principal (r).

2. The directors of a company signed a contract in the following terms:—"We, the undersigned, three of the directors, agree to repay £500 advanced by A to the company," and at the same time assigned to A, as security, certain property belonging to the company. Held, that the directors were personally liable (s). But where an agent signed a contract in the following form—"I undertake, on behalf of A (the principal), to pay, etc.," it was held that he was not personally liable (t).

3. A broker sent a contract note in the following terms:—"Messrs. S.—I have this day sold by your order and for your account to my principal, etc., one per cent. brokerage"; (signed) "W A B". Held, that W A B was not personally liable in an action for goods sold (u).

4. A solicitor wrote—"I hereby undertake to pay on behalf of these creditors (his clients) two-thirds" of certain expenses. Held, that he was personally liable (x). So, the solicitor of the assignees of a bankrupt tenant was held personally liable on an undertaking as follows:—"I, as solicitor to

(o) Illustrations 9 to 11. *Green v. Hopke* (1856), 25 L. J. C. P. 297; 18 C. B. 549; *Mahony v. Kekulé* (1854), 23 L. J. C. P. 54; 14 C. B. 390; *Hahn v. North German Pitwood Co.* (1892), 8 T. L. R. 557.

(p) Illustration 5. *Paice v. Walker*, *supra*, note (n); *Hutcheson v. Eaton* (1884), 13 Q. B. D. 861, C. A.; *Hopcroft v. Parker* (1867), 16 L. T. 561.

(q) Illustration 8. *Glover v. Langford* (1892), 8 T. L. R. 628; *Reynolds v. Peapes* (1890), 6 T. L. R. 49; *Hahn v. North German Pitwood Co.*, *supra*; *Green v. Hopke*, *supra*; *Mahony v. Kekulé*, *supra*; *Miller v. Smith*, [1917] 2 K. B. 141; 86 L. J. K. B. 1259, C. A.; *Mercer v. Wright* (1917), 33 T. L. R. 343.

(r) *Norton v. Herron* (1825), 1 C. & P. 648; *Tanner v. Christian* (1855), 24 L. J. Q. B. 91; 4 E. & B. 591.

(s) *McCollin v. Gilpin* (1881), 6 Q. B. D. 516, C. A.

(t) *Downman v. Williams (or Jones)* (1845), 7 Q. B. 103; 14 L. J. Q. B. 226; 68 R. P. 413, Ex. Ch.; *Avery v. Charlesworth* (1914), 31 T. L. R. 52, C. A.

(u) *Southwell v. Bowditch* (1876), 1 C. P. D. 374; 45 L. J. C. P. 630, C. A.

(x) *Hall v. Ashurst* (1833), 1 C. & M. 714; *Iverson v. Conington* (1823), 1 B. & C. 160. *Comp. Allaway v. Duncan* (1867), 16 L. T. 264.

the assignees, undertake to pay the landlord his rent, provided it do not exceed the value of the effects distrained" (y).

5. A charterparty was expressed to be made between A B and C D, agent for E F & Son, and was signed by C D, without qualification. Held, that C D was personally liable, though the principals were named, there being nothing in the terms of the contract clearly inconsistent with an intention to contract personally (z).

6. An agent was described in a contract as "consignee and agent on behalf of Mr. M, of L," and it was stated that "the said parties agreed," etc., the contract being signed by the agent in his own name without qualification. Held, that the agent was personally liable (a).

7. An agent signed, without qualification, a contract in the following form: "Sold A B 200 quarters wheat (as agent for C F & Co., Dantzic)." Held, that the words, "as agent for C F & Co., Dantzic," in the body of the contract, did not clearly show that the agent did not intend to contract personally; and that, as he had signed it without qualification, he was personally liable (b). This was a unanimous decision of the Court of Exchequer; but it was disapproved by James, L.J., and Mellish, L.J., in *Gadd v. Houghton* (cited below), on the ground that the words "as agent" were sufficient to show that there was no intention to contract personally.

8. A contract in the following terms—"We have this day sold to you on account of J M & Co., Valencia, etc.," was signed by home agents in their own names without qualification. Held, that the agents were not personally liable, though the contract was made on behalf of foreign principals, the words "on account of" clearly showing that there was no intention to contract personally (c). So, where a home agent was described as contracting "on behalf of A B, Roanne," it was held that he was not liable, though he signed the contract in his own name without qualification (d).

9. A contract is signed "for A B, of L, C Bros., as agents." C Bros. are not liable, unless it clearly appears from the body of the contract that they intended to bind themselves (e). So, where a contract was signed "G W, J L, for C J M & Co.," it was held that G W and J L were not personally liable (f).

10. A charterparty was signed "For and on behalf of James McKelvie & Co. as agents, J. A. McKelvie," but James McKelvie & Co. were described in the body of the agreement as charterers. Held, that James McKelvie & Co.

(y) *Burrell v. Jones* (1819), 3 B. & A. 47; *Harper v. Williams* (1843), 4 Q. B. 219; 12 L. J. Q. B. 227.

(z) *Parker v. Winlow* (1857), 27 L. J. Q. B. 49; 7 E. & B. 942.

(a) *Kennedy v. Gouveia* (1823), 3 D. & R. 503.

(b) *Paice v. Walker* (1870), L. R. 5 Ex. 173; 39 L. J. Ex. 109. See also *Brandt v. Morris*, [1917] 2 K. B. 784, C. A.

(c) *Gadd v. Houghton* (1876), 1 Ex. D. 357; 46 L. J. Ex. 71, C. A.; *Spittle v. Lavender* (1821), 2 B. & B. 452.

(d) *Ogden v. Hall* (1879), 40 L. T. 751.

(e) *Deslandes v. Gregory* (1860), 30 L. J. Q. B. 36, Ex. Ch.; *Miller v. Smith*, [1917] 2 K. B. 141; 86 L. J. K. B. 1259, C. A.

(f) *Redpath v. Wigg* (1866), L. R. 1 Ex. 335; 35 L. J. Ex. 211, Ex. Ch.

were not personally liable, the qualified signature indicating an intention to exclude personal liability (g).

11. An agent signed a contract—"P P A, J A & Co., A B." The contract contained a clause, providing that A B should guarantee moneys due from his principal to the other contracting party. Parol evidence was admitted to show that A B intended to sign, not only as an agent, but also as a surety. Held, that such evidence was rightly admitted, and that he must be taken to have signed in both capacities (h).

Article 120.

ADMISSIBILITY OF PAROL EVIDENCE OF INTENTION.

Where it appears from the terms of a written contract made by an agent that he contracted personally, parol evidence is not admissible to show that, notwithstanding the terms of the contract, it was the intention of the parties that he should not be personally liable thereon, because such evidence would be contradictory to the written contract (i); but he may, by way of equitable defence, prove a verbal agreement that, in consideration of his being merely an agent, he should not be personally liable on the contract, because it would be inequitable in such a case to take advantage of his having contracted personally (k).

Where it appears from the terms of a written contract made by an agent that he contracted merely as an agent, parol evidence is nevertheless admissible to show that, by a custom or usage in the particular trade or business, an agent so contracting is liable on the contract, either absolutely or conditionally; provided that such custom or usage is not inconsistent with nor repugnant to the express terms of the written contract (l).

Illustrations.

1. An agent signed a charterparty expressly "as agent for principals," the principals being undisclosed. It was held that, although it plainly appeared that he did not intend to contract as principal, it might nevertheless be proved that, by a general custom, an agent so signing was, in the ordinary course of trade, personally liable on the contract in the event of his not disclosing the principals within a reasonable time, such a custom not being inconsistent with the terms of the contract (m).

(g) *Universal S. N. Co. v. McKelvie*, [1923] A. C. 492; 92 L. J. K. B. 647, H. L., overruling *Lennard v. Robinson* (1855), 24 L. J. Q. B. 275; 5 E. & B. 125. See also *Kimber Coal Co. v. Stone*, [1926] A. C. 414; 95 L. J. K. B. 601, H. L.

(h) *Young v. Schuler* (1883), 11 Q. B. D. 651, C. A.

(i) *Higgins v. Senior* (1841), 8 M. & W. 834; *Holding v. Elliott* (1860), 29 L. J. Ex. 134; 5 H. & N. 117; *Jones v. Littledale* (1837), 6 L. J. K. B. 169; 1 N. & P. 677.

(k) *Wake v. Harrop* (1862), 31 L. J. Ex. 451; 1 H. & C. 202, Ex. Ch.; affirming 6 H. & N. 768; *Cowie v. Witt* (1874), 23 W. R. 76. And see *Kidson v. Dilworth* (1818), 5 Price, 564.

(l) Illustrations 1 to 4.

(m) *Hutchinson v. Tatham* (1873), L. R. 8 C. P. 482; 42 L. J. C. P. 260.

2. A broker entered into a contract in the following terms:—"Sold by A to Messrs. B, for and on account of owner, 100 bales of hops." An action was brought against A for not delivering the hops according to sample. Evidence of a custom in the hop trade, whereby a broker who does not disclose his principal at the time of the contract is personally liable, was admitted, and the broker was held liable on the contract (n).

3. A and B, who were brokers, contracted in the following terms:—"We have this day sold for your account to our principal, etc." (signed), "A and B, brokers." Some of the goods were accepted by the principal, whose name was declared by A and B before delivery, and an action was subsequently brought against A and B for not accepting the residue. Held, that they were personally liable, it being proved that by a custom in the particular trade, the broker was personally liable for his principal's default unless the name of the principal was inserted in the written contract (o). So, by the usage of the London dry goods market, where a broker buys goods for an undisclosed principal, he is personally liable for the price (p).

4. Brokers entered, as such, into a contract, which contained a clause providing that they should act as arbitrators in the event of any dispute between the parties. Held, that evidence of a custom rendering them personally liable on the contract was inadmissible, because the custom was inconsistent with the clause appointing them arbitrators (q).

Article 121.

VERBAL CONTRACTS.

Where an agent makes a contract which is not reduced to writing, the question whether he contracted personally or merely in his capacity of an agent is a question of fact (r).

Illustrations.

1. Brokers sell goods by auction, and invoice them in their own names as sellers. It is a question of fact whether the invoice was intended to be the contract. If it were, the brokers are personally liable. If not, it is a question of fact whether they intended to contract personally (s).

2. An estate agent contracted to sell land, and gave a receipt in his own name for the deposit. Held, that it was a question of fact whether he

(n) *Pike v. Ongley* (1887), 18 Q. B. D. 708; 56 L. J. Q. B. 373; *Dale v. Humfrey*, *Humfrey v. Dale* (1858), 27 L. J. Q. B. 390; El. Bl. & El. 1004; 113 R. R. 964, Ex. Ch. (similar custom in the oil trade).

(o) *Fleet v. Murton* (fruit trade and colonial market) (1871), L. R. 7 Q. B. 126; 41 L. J. Q. B. 49. Similar custom in the rice trade: *Baumeister v. Fenton* (1883), 1 C. & E. 121.

(p) *Imperial Bank v. L. & St. Katharine's Docks Co.* (1876), 5 Ch. D. 195; 46 L. J. Ch. 335.

(q) *Barrow v. Dyster* (1884), 13 Q. B. D. 635.

(r) *Lakeman v. Mountstephen* (1874), L. R. 7 H. L. 17; 43 L. J. Q. B. 188, H. L.; *Gurney v. Womersley* (1854), 4 E. & B. 133; 24 L. J. Q. B. 46; *Magee v. Atkinson* (1837), 2 M. & W. 440; 6 L. J. Ex. 115; *Seaber v. Hawkes* (1831), 5 M. & P. 549; *Ex p. Hartop* (1806), 12 Ves. 352; *Johnson v. Ogilby* (1734), 3 P. Wms. 277; *Owen v. Gooch* (1797), 2 Esp. 567; *Castle v. Duke* (1832), 5 C. & P. 359.

(s) *Jones v. Littledale* (1837), 6 A. & E. 486; 6 L. J. K. B. 169; *Holding v. Elliott* (1860), 5 H. & N. 117; 29 L. J. Ex. 134.

contracted personally (t). So, where an agent bought goods at a sale by auction, and gave his own name as buyer (u).

Article 122.

EFFECT OF JUDGMENT AGAINST PRINCIPAL.

The liability of an agent on any contract made by him is discharged by a judgment being obtained against the principal on the contract (x).

Article 123.

AGENT SHOWN TO BE THE REAL PRINCIPAL.

Where a person professes to contract as an agent, whether in writing or verbally, and it is shown that he is, in fact, himself the principal, and was acting on his own behalf, he is personally liable on the contract (y).

Article 124.

PRINCIPAL FICTITIOUS OR NON-EXISTENT.

Where a person professes to contract on behalf of a principal, and the principal is a fictitious or non-existent person, the person so professing to contract is presumed to have intended to contract personally, unless a contrary intention be proved, and where the contract is in writing, such intention cannot be proved by parol evidence, but must appear from the terms of the contract or from the surrounding circumstances.

Illustrations.

1. A enters into a written contract on behalf of a company not yet incorporated. A is personally liable on the contract, even if he express himself as contracting on behalf of the future company, and parol evidence is not admissible to show that he did not intend to contract personally, because it is only by holding him personally liable that any effect at all can be given to the contract (z).

2. The promoters of a future company borrowed money from a bank, to be repaid out of calls on shares. Held, that the promoters must be taken to

(t) *Long v. Millar* (1879), 4 C. P. D. 450; 48 L. J. C. P. 596, C. A.

(u) *Williamson v. Barton* (1862), 7 H. & N. 899; 31 L. J. Ex. 170.

(x) *L. G. O. Co. v. Pope* (1922), 38 T. L. R. 270.

(y) *Carr v. Jackson* (1852), 7 Ex. 362; 21 L. J. Ex. 137; *Jenkins v. Hutchinson* (1849), 13 Q. B. 744; 18 L. J. Q. B. 274; *Railton v. Hodgson* (1812), 15 East, 67; *Adams v. Hall* (1877), 37 L. T. 70.

(z) *Kelner v. Baxter* (1866), L. R. 2 C. P. 174; 36 L. J. C. P. 94; *Wilson v. Baker* (1901), 17 T. L. R. 473. A company cannot ratify a contract made before its incorporation. *Comp. Holtman v. Pullin* (1884), 1 C. & E. 254.

have contracted to repay the money out of calls, if the calls should prove sufficient, and if not, to pay personally (a).

3. The managing committee of a club authorise the steward to order provisions for the use of the club. A supplies provisions on his orders, and invoices them to the club. If A looked to the funds of the club alone for payment, and contracted on the term that if there were no such funds, he should not be paid, the committee are not personally liable. But they are personally liable if he gave credit to them (b). Whether A gave credit to the committee or looked to the funds of the club alone is a question of fact (b).

4. A, a colonel of a volunteer corps, contracts on behalf of the corps with B. A does not intend to pledge, nor does B intend to accept, his personal credit, but both think that the corps as an entity may be bound. A is not personally liable on the contract (c).

Article 125.

IMPLIED WARRANTY OF AUTHORITY.

Where any person, by words or conduct, represents that he has authority to act on behalf of another, and a third person is induced by such representation to act in a manner in which he would not have acted if such representation had not been made, the first-mentioned person is deemed to warrant that the representation is true, and is liable for any loss caused to such third person by a breach of such implied warranty, even if he acted in good faith, under a mistaken belief that he had such authority (d). Where any such representation is made fraudulently, the person injured thereby may sue either in contract for the breach of warranty, or in tort for the deceit, at his option (e).

Every person who professes to contract as an agent is deemed by his conduct to represent that he is in fact duly authorised to make the contract (f), except where the nature and extent of

(a) *Scott v. Ebury* (1867), L. R. 2 C. P. 255; 36 L. J. C. P. 161; *Coutts v. Irish Exhibition* (1891), 7 T. L. R. 313, C. A.

(b) *Steele v. Gourley* (1887), 3 T. L. R. 772, C. A.; *Overton v. Hewett* (1887), 3 T. L. R. 246; *Bailey v. Macaulay* (1849), 13 Q. B. 815; 19 L. J. Q. B. 73.

(c) *Jones v. Hope* (1880), 3 T. L. R. 247, n., C. A. Comp. *Cross v. Williams* (1862), 31 L. J. Ex. 145; *Samuel v. Weatherby*, [1908] 1 K. B. 184; 77 L. J. K. B. 69, C. A.

(d) Illustrations 1 to 12. *Ozenham v. Smythe* (1861), 31 L. J. Ex. 110; 6 H. & N. 690; *Cherry v. Colonial Bank* (1869), 38 L. J. P. C. 49, P. C.; *Brown v. Law* (1895), 72 L. T. 779, H. L.; *British Russian Gazette v. Associated Newspapers*, [1933] 2 K. B. 616; 102 L. J. K. B. 775, C. A. This principle does not extend to public agents, contracting on behalf of the Crown: *Dunn v. Macdonald*, [1897] 1 Q. B. 555; 66 L. J. Q. B. 420, C. A.; See Article 115.

(e) *Randell v. Trimen* (1856), 25 L. J. C. P. 307; 18 C. B. 786; *Polhill v. Walter* (1832), 3 B. & Ad. 114; 1 L. J. K. B. 92.

(f) *Collen v. Wright* (1857), 27 L. J. Q. B. 215; 7 E. & B. 301; 8 E. & B. 647, Ex. Ch.; *Suart v. Haigh* (1893), 9 T. L. R. 488, H. L. See Illustrations 6 to 11, and Illustrations to Article 126. Where the authority is disputed by the person on whose behalf the contract is made, the person who made the contract may be joined with him as a co-defendant, and relief be claimed against them alternatively: *Honduras Ry. v. Leferre*

his authority or all material facts known to him from which its nature and extent may be inferred, are fully known to the other contracting party (g).

This article does not extend to a representation made in good faith with regard to a question of law, in which no representation of fact is involved (h).

Illustrations.

1. The directors of a company wrote a letter to the company's bankers representing that A had been appointed manager and had authority to draw cheques on the company's account, which, to the knowledge of the directors, was already overdrawn. A further overdrew the account, the directors having, in fact, no authority to overdraw. Held, that the directors were liable to the bankers for breach of an implied warranty that they had authority to overdraw (i). But the mere fact that directors of a company in that capacity sign cheques drawn on the company's bankers after the account is overdrawn, does not amount to a representation that they have authority to overdraw the account, or to borrow money on the company's behalf (k).

2. A lent £70 to a building society, and received a certificate of the deposit, signed by two directors. The society had no borrowing powers. Held, that the directors were personally liable to A on an implied warranty that they had authority to borrow on behalf of the society (l).

3. The directors of a company issued a certificate for debenture stock, which A agreed to accept in lieu of cash due to him from the company, all the debenture stock that the company has power to issue having already been issued. Held, that the directors were liable to A on an implied warranty that they had authority to issue valid debenture stock, although they had acted in good faith, not knowing that all the stock had been issued (m). So, where directors of a company which had already fully exercised its borrowing powers, issued a debenture bond, it was held that the directors thereby impliedly warranted that they had authority to issue a valid debenture (n).

4. The directors of an unincorporated company held out the secretary as having authority to borrow in excess of the amount prescribed by the rules of the company. The secretary borrowed in excess of such amount, and misappropriated the money. Held, that the directors were personally liable to the lenders on an implied warranty of authority, though they had not acted fraudulently (o).

(1877), 2 Ex. D. 301; 46 L. J. Ex. 391; *Bennetts v. McIlwraith*, [1896] 2 Q. B. 464; 65 L. J. Q. B. 632, C. A.

(g) Illustrations 9 to 11. See also *Beattie v. Ebury* (1874), 41 L. J. Ch. 804.

(h) Illustrations 13 to 14. *Beattie v. Ebury*, *supra*; affirmed L. R. 7 H. L. 102, H. L.; *Saffron Walden Building Society v. Rayner* (1880), 14 Ch. D. 406; 49 L. J. Ch. 465, C. A. (i) *Cherry v. Colonial Bank* (1869), 38 L. J. P. C. 49, P. C.

(k) *Beattie v. Ebury*, *supra*, note (g).

(l) *Richardson v. Williamson* (1871), L. R. 6 Q. B. 276; 40 L. J. Q. B. 145.

(m) *Firbank v. Humphreys* (1886), 18 Q. B. D. 54; 56 L. J. Q. B. 57, C. A. Comp. *Elkington v. Hurter*, [1892] 2 Ch. 452; 61 L. J. Ch. 514, and Illustration 14.

(n) *Weeks v. Propert* (1873), L. R. 8 C. P. 427; 42 L. J. C. P. 129; *Whitehaven Bank v. Reed* (1886), 2 T. L. R. 353, C. A. Comp. Illustration 14.

(o) *Chapleo v. Brunswick Building Society* (1881), 6 Q. B. D. 696; 50 L. J. Q. B. 372, C. A. Comp. *Smith v. Reed* (1886), 2 T. L. R. 442, C. A.

5. A stockbroker, acting in good faith, induces the Bank of England to transfer consols to a purchaser under a forged power of attorney. He is liable, in an action for breach of an implied warranty of authority, to indemnify the Bank against the claim of the stockholder for restitution (*p*).

6. A acts as broker for both buyer and seller. He impliedly warrants to each that he is duly authorised to act on behalf of the other (*q*).

7. An auctioneer by mistake sells a horse by auction without authority. He is liable to the purchaser on an implied warranty of authority for loss of the bargain (*r*). But where goods are sold by auction under conditions which provide that each lot shall be offered subject to a reserve price, and the auctioneer, having by mistake accepted a bid for less than the reserve price, discovers his mistake immediately, withdraws the lot, and refuses to sign a memorandum of the contract, he is not liable in an action for breach of implied warranty of authority, because in such a case the offer, bidding, and acceptance are all conditional on the reserve price having been reached (*s*). Otherwise, if he sign a memorandum (*t*).

8. The directors of a company accepted a bill of exchange drawn on the company, but told the drawer that they had no power to accept bills on the company's behalf, and that they did it merely in recognition of the company's debt, and on the express understanding that the bill should not be negotiated. Held, that the directors were liable to an indorsee for value, who had no notice of the circumstances, on an implied warranty that they had authority to accept the bill on behalf of the company (*u*).

9. A widow, not having received any information that her husband was dead, ordered necessaries from a tradesman who had previously supplied goods to her on the credit of the husband and been paid for them by him, the husband, to the knowledge of the tradesman, having been resident abroad. Held, that the circumstances being equally within the knowledge of both parties, and the widow not having omitted to state any fact known to her which was relevant to the existence or continuance of her authority, she was not liable for the price of the necessaries (*x*). So, a person purporting to contract as agent is not liable for breach of warranty of authority if the other party be aware that he is not in fact authorised, or the professing agent expressly disclaim any present authority (*y*).

10. A shipbroker signs a charterparty—"by telegraphic authority; as agent." It is proved that such a form of signature is commonly adopted to

(*p*) *Starkey v. Bank of England*, [1903] A. C. 114; 72 L. J. Ch. 402, H. L. And see *Sheffield Corpn. v. Barclay*, [1905] A. C. 392; 74 L. J. K. B. 747, H. L.; *Bank of England v. Culler*, [1908] 2 K. B. 208; 77 L. J. K. B. 889, C. A.

(*q*) *Hughes v. Graeme* (1864), 33 L. J. Q. B. 335. See also *Queensland Investment Co. v. O'Connell* (1896), 12 T. L. R. 502.

(*r*) *Anderson v. Croall* (1904), 6 F. 153.

(*s*) *McManus v. Fortescue*, [1907] 2 K. B. 1; 76 L. J. K. B. 393, C. A. And see *Sheffield v. Howkins*, [1904] 2 K. B. 322; 73 L. J. K. B. 641.

(*t*) *Fay v. Miller*, [1941] Ch. 360; 110 L. J. Ch. 124, C. A.

(*u*) *West London Bank v. Kitson* (1884), 13 Q. B. D. 360; 53 L. J. Q. B. 345, C. A.

(*x*) *Smout v. Ilbery* (1842), 10 M. & W. 1. In *Sutton v. New Beeston Cycle Co.*, [1900] 1 Ch. 43; 69 L. J. Ch. 20, the principle was applied in the case of the dissolution of a company.

(*y*) *Halbot v. Lens*, [1901] 1 Ch. 344; 70 L. J. Ch. 125.

negative the implication of any further warranty by the agent than that he has received a telegram, which, if correct, authorises such a charterparty as he is signing. The shipbroker is not answerable for a mistake in the telegram (z).

11. H, a shipbroker, professes to make a charterparty on behalf of A, and signs it—"by telegraphic authority of B; G H, as agent." B is A's agent, but A did not authorise the charterparty. H is liable for breach of an implied warranty that he has authority to make the charterparty on behalf of A, though he acted in good faith, believing that the telegram from B gave him such authority (a).

12. Where a solicitor, without authority, prosecutes or defends an action, the action will in general be dismissed or the defence struck out on the motion of either the plaintiff or the defendant, and the solicitor so acting without authority be ordered to pay all the costs occasioned thereby (b).

13. A professes to contract on behalf of a volunteer corps with B, both parties erroneously thinking that the corps as an entity may be bound. A is not liable to B on an implied warranty of authority, because the facts were equally well known to both, and there was merely a common misconception in point of law (c).

14. The directors of a company having no borrowing powers induce A to advance money on the security of a Lloyd's bond, which they in good faith represent to be a valid security, A being aware that the company has no borrowing powers. The directors are not liable on an implied warranty of authority, though the bond is invalid, because its validity is a question of law (d). So, where directors issued certain stock and described it as No. 1 Preference Stock, in the erroneous belief that they had power to issue stock to rank with the No. 1 Preference Stock already issued, and A purchased some of the new stock, knowing that it was new stock, but believing that it would rank with the No. 1 Preference, it was held that the directors were not liable to make good the misrepresentation, because it was a misrepresentation as to a matter of law, and A had not been deceived by any misrepresentation of fact (e).

(z) *Lilly v. Smales*, [1892] 1 Q. B. 456.

(a) *Suart v. Haigh* (1893), 9 T. L. R. 488, H. L.

(b) *Hubbart v. Phillips* (1845), 14 L. J. Ex. 103; 2 D. & L. 707; *Nurse v. Durnford* (1879), 13 Ch. D. 764; 49 L. J. Ch. 229; *Schjott v. Schjott* (1881), 45 L. T. 333, C. A.; *Newbiggin Gas Co. v. Armstrong* (1879), 13 Ch. D. 310; 49 L. J. Ch. 231, C. A.; *Reynolds v. Howell* (1873), L. R. 8 Q. B. 398; 42 L. J. Q. B. 181; *Re Savage* (1880), 15 Ch. D. 557; *Re Manby* (1856), 26 L. J. Ch. 313; *Fricker v. Van Grutten*, [1896] 2 Ch. 649; 65 L. J. Ch. 823, C. A.; *Gold Reefs of Western Australia v. Dawson*, [1897] 1 Ch. 115; 66 L. J. Ch. 147; *Geilinger v. Gibbs*, [1897] 1 Ch. 479; 66 L. J. Ch. 230; *Salton v. New Beeston Cycle Co.*, [1900] 1 Ch. 43; 69 L. J. Ch. 20; *Yonge v. Tonybee*, [1910] 1 K. B. 215; 79 L. J. K. B. 208, C. A.; *Simmons v. Liberal Opinion, Ltd., Re Dunn*, [1911] 1 K. B. 966; 80 L. J. K. B. 617, C. A.; *Porter v. Fraser* (1912), 29 T. L. R. 91; *Fernée v. Gorlitz*, [1915] 1 Ch. 177; 84 L. J. Ch. 404; *Brendon v. Spiro*, [1938] 1 K. B. 176, C. A. See, however, *Hammond v. Thorpe* (1834), 1 C. M. & R. 64; *Thomas v. Finlayson* (1871), 19 W. R. 255.

(c) *Jones v. Hope* (1880), 3 T. L. R. 247, n., C. A.

(d) *Rashdall v. Ford* (1886), L. R. 2 Eq. 750; 35 L. J. Ch. 769.

(e) *Eaglesfield v. Londonderry* (1876), 38 L. T. 303, H. L.; affirming 4 Ch. D. 693.

Article 126.

MEASURE OF DAMAGES FOR BREACH OF WARRANTY OF AUTHORITY.

The measure of damages for breach of an express or implied warranty of authority is the loss sustained, either as a natural and probable consequence, or such as both parties might reasonably expect to result as a probable consequence, of the breach of warranty (f).

Where a contract is repudiated by the person on whose behalf it was made, on the ground that it was made without his authority, such loss is *prima facie* the amount of damages that could have been recovered from him in an action at law if he had duly authorised and refused to perform the contract, together with the costs and expenses (if any) incurred in respect of any legal proceedings reasonably taken against him on the contract (g). Where the contract would not have been enforceable at law, as against the principal, even if he had duly authorised it, because the formalities required by law were not observed, the equitable doctrine of part performance does not apply so as to give a remedy in equity for damages in respect of the breach of warranty of authority (h).

Illustrations.

1. The directors of a company represent that they have authority to issue debenture stock, and A is induced to accept such stock in lieu of cash, in payment of a debt owing to him by the company. The measure of damages for breach of the implied warranty of authority is the amount that A could have recovered from the company if the stock had been valid (i).

2. Directors of a building society represent that they have authority to borrow money on behalf of the society, and A is induced to lend £70. The society being solvent, the measure of damages for breach of the implied warranty of authority, is £70, with interest at the rate agreed upon (k).

3. A contracted, on behalf of B, to buy a ship. A was not authorised so to do, and B repudiated the contract. The seller having resold the ship at a lower price, it was held that the measure of damages recoverable against A was the difference between the contract price and the price at which the vessel was resold (l).

4. A instructed B to apply for shares in a certain company. B by mistake applied for shares in another company, and they were duly allotted to A.

(f) Illustrations 1 to 8. *Mitchell v. Kahl* (1862), 2 F. & F. 709.

(g) Illustrations 3, and 6 to 8.

(h) Illustration 9. Nor is there any remedy at law in such a case because, the contract not being enforceable at law, there is no legal damage from the breach of warranty. And see Article 125, Illustration 7.

(i) *Firbank v. Humphreys* (1886), 18 Q. B. D. 54; 56 L. J. Q. B. 57, C. A., cited *ante*, p. 250; *Weeks v. Propert* (1873), L. R. 8 C. P. 427; 42 L. J. C. P. 129; *Whitehaven Bank v. Reed* (1886), 2 T. L. R. 353, C. A.

(k) *Richardson v. Williamson* (1871), L. R. 6 Q. B. 276; 40 L. J. Q. B. 145.

(l) *Simons v. Patchett* (1857), 26 L. J. Q. B. 195; 7 E. & B. 568.

The last-mentioned company was ordered to be wound up, and A's name was removed from the list of contributories on the ground that he had not authorised the application for shares. Held, that, A being solvent and the shares unsaleable, the liquidator of the company was entitled to recover from B the full amount payable on the shares (*m*).

5. A brought an action against a company in the United States, and recovered judgment for £1,000. An agent of the company in good faith represented that he had authority to settle for £300, and A agreed to accept that sum. The agent was, in fact, not authorised to settle. Held, that, the judgment against the company being, in the circumstances, unenforceable, A was entitled to recover £300 from the agent for the breach of the implied warranty of authority (*n*).

Costs of Action Against Principal.

6. A bought goods, professedly on behalf of B. The seller brought an action for the price against B, which was dismissed with costs, on the ground that A was not authorised by B. Held, that the seller was entitled to recover from A the price of the goods, and also the costs incurred in the action against B (*o*).

7. A professed to sell property on behalf of B. Held, that A, not being authorised to sell, was liable to the purchaser for the costs of a suit for specific performance against B, as well as for the value of the contract (*p*). But where an agent without authority verbally contracted to grant a lease for seven years, and the lessee entered into possession and defended an action of ejectment brought by the owner of the property, it was held that the lessee was not entitled to recover from the agent the costs of such action, as damages for the breach of warranty of authority, because he could not have successfully defended an action of ejectment, even if the agent had been duly authorised to grant the lease (*q*).

8. *Loss must be a natural and probable consequence of the breach.*—A contracted to sell an estate to B, and sent him an abstract of title, representing that he had the authority of the owners to sell. The owners repudiated the contract and sold the estate at a higher price to C. B sued the owners, and was non-suited. In an action by B against A, it was held that the measure of damages for the breach of warranty of authority was—(1) the costs of investigating the title; (2) the costs of the action up to the non-suit; and (3) the difference between the contract and market prices of the estate, the price at which it was resold to C being *prima facie* evidence of the market price; but that the loss on a re-sale of horses, which were bought to stock the land before the investigation of the title and without notice to A, was too remote,

(*m*) *Re National Coffee Palace Co., ex p. Panmure* (1883), 24 Ch. D. 367; 53 L. J. Ch. 57, C. A.

(*n*) *Meek v. Wendt* (1888), 21 Q. B. D. 126.

(*o*) *Randell v. Trimen* (1856), 18 C. B. 786; 25 L. J. C. P. 307.

(*p*) *Hughes v. Graeme* (1864), 33 L. J. Q. B. 335; *Collen v. Wright* (1857), 8 El. & Bl. 647; 27 L. J. Q. B. 215, Ex. Ch.

(*q*) *Pow v. Davis* (1861), 30 L. J. Q. B. 257; 1 B. & S. 220. Such a lease must be by deed (Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 52), and every contract for a lease must be in writing (*ib.*, s. 40).

Art. 127] LIABILITY IN RESPECT OF MONEYS RECEIVED.

it not appearing that the purchase of stock was contemplated by the parties when the contract was made (r). So, where an agent without authority granted a lease, and the lessee agreed to sell his interest, it was held that damages and costs recovered against the lessee for breach of such agreement to sell could not be recovered by him in an action against the agent for breach of warranty of authority, because such damages and costs were not a natural and probable consequence of the breach of warranty; but that the lessee was entitled to recover the value of the lease, and the costs of a suit for specific performance against the principal (s).

9. *No remedy on doctrine of part performance.*—A verbally contracts, without authority, to sell real estate to B. B has no remedy in equity against A for the breach of warranty of authority, on the ground of part performance (t).

Sect. 2.—*Liabilities of Agents in Respect of Moneys Received.*

Article 127.

TO REPAY MONEY RECEIVED FOR USE OF PRINCIPAL.

Where money is paid to an agent for the use of his principal, and the circumstances of the case are such that the person paying the money is entitled to recover it back, the agent is personally liable to repay such money in the following cases, namely:—

- (a) Where the agent contracts personally, and the money is paid to him in respect of or pursuant to the contract, unless the other contracting party elects to give exclusive credit to the principal (u);
- (b) Where the money is obtained by duress (x), or by means of any fraud or wrongful act (y) to which the agent is party or privy;
- (c) Where the money is paid under a mistake of fact, or under duress, or in consequence of some fraud or wrongful act, and repayment is demanded of the agent, or notice is given to him of the intention of the payer to demand repayment, before he has in good faith paid the money over to, or otherwise dealt to his

(r) *Godwin v. Francis* (1870), L. R. 5 C. P. 295; 39 L. J. C. P. 121.

(s) *Spedding v. Nevell* (1869), L. R. 4 C. P. 212; 38 L. J. C. P. 133.

(t) *Warr v. Jones* (1876), 24 W. R. 695; *Sainsbury v. Jones* (1840), 2 Beav. 462; 48 R. R. 217. Nor is there any remedy at law in such a case, in consequence of the provisions of the Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 40.

(u) Illustrations 1 and 9.

(x) Illustration 2. This does not apply where the duress does not proceed from the agent, and he has paid over the money without notice that it was paid under duress: *Owen v. Cronk*, [1895] 1 Q. B. 265; 64 L. J. Q. B. 288.

(y) Illustrations 3 to 5. *Townson v. Wilson* (1808), 1 Camp. 396; *Steele v. Williams* (1853), 8 Ex. 625; 22 L. J. Ex. 225.

detriment with, the principal in the belief that the payment was a good and valid payment (z).

Except as in this Article provided, no agent is personally liable to repay money received by him for the use of his principal (a).

Illustrations.

1. An agent discounts certain bills, and in good faith pays over the proceeds to his principal. The bills turn out to be forgeries. The discounter has no remedy against the agent unless he indorsed or guaranteed the bills, or dealt as a principal with the discounter (b). But the agent is personally liable to repay the amount, as upon a total failure of consideration, if he dealt as a principal with the discounter (c).

2. A sheriff issued a warrant of distress against A. The bailiff levied the debt on the goods of B, and, under pressure of the illegal distress, B paid the debt. Held, that the bailiff was personally liable to repay B, though he had paid the amount over to the sheriff (d).

3. Pending a bankruptcy petition, and with notice of the act of bankruptcy, a solicitor, as the agent of the petitioning creditor, received from the debtor various sums of money in consideration of the adjournment of the petition, and paid such sums over to his principal. Held, that the solicitor was personally liable to repay the amount to the trustee in bankruptcy, notwithstanding the payment over, because the money was obtained wrongfully (e).

4. An agent who acts for an executor *de son tort* is personally liable to account for assets collected by him, even after he has paid them over to his principal. Payment over is no defence in the case of wrongdoers (f).

5. An agent demands more money than is due, and wrongfully withholds documents from A, who pays him the amount demanded, under protest, in order to recover the documents. The agent is personally liable to A in respect of the amount overpaid, even after he has paid the money over to the principal (g).

6. An insurance agent received money from an underwriter in respect of a voidable policy, and settled with the principal for the amount, amongst other matters, without notice of the underwriter's intention to dispute the

(z) Illustration 9. *Cary v. Webster* (1731), 1 Str. 480.

(a) Illustrations 1, 6 to 12. *Cary v. Webster* (1731), 1 Str. 480; *Greenway v. Hurd* (1792), 4 T. R. 553; *Davys v. Richardson* (1888), 21 Q. B. D. 202; 57 L. J. Q. B. 409, C. A.; *Taylor v. Metropolitan Ry.*, [1906] 2 K. B. 55; 75 L. J. K. B. 735; *Steam Saw Mills v. Baring*, [1922] 1 Ch. 244; 91 L. J. Ch. 325, C. A.; *Gowers v. Lloyds, etc.*, *Foreign Bank* (1938), 158 L. T. 467, C. A.

(b) *Ex p. Bird, re Bourne* (1851), 20 L. J. Bk. 16; 4 De G. & S. 273.

(c) *Gurney v. Womersley* (1854), 4 E. & B. 133; 24 L. J. Q. B. 46; *Royal Exchange Ass. v. Moore* (1863), 8 L. T. 242.

(d) *Snowden v. Davis* (1808), 1 Taunt. 359. *Comp. Goodall v. Lowndes* (1844), 6 Q. B. 464.

(e) *Ex p. Edwards, re Chapman* (1884), 13 Q. B. D. 747, C. A.

(f) *Sharland v. Mildon* (1846), 15 L. J. Ch. 434; 5 Hare, 469; *Padget v. Priest* (1787), 2 T. R. 97.

(g) *Smith v. Sleep* (1844), 12 M. & W. 585; *Oates v. Hudson* (1851), 6 Ex. 346; 20 L. J. Ex. 284; *Wakefield v. Newbon* (1844), 6 Q. B. 276; 13 L. J. Q. B. 258; *Close v. Phipps* (1844), 7 M. & G. 586.

policy, and without fraud. Held, that the agent was not liable to repay the amount to the underwriter, who had paid it to him under a mistake of fact (*h*).

7. A bill of exchange was indorsed, without the holder's authority, to A. The acceptor paid A's agent for collection, who handed the money over to A without notice of any defect in A's title. The acceptor was compelled to pay over again to the holder whose authority was wrongfully assumed. Held, that A's agent for collection was not personally liable to refund the amount to the acceptor (*i*).

8. The solicitor of the vendor at a sale by auction receives a deposit as agent for the vendor. The sale goes off through the vendor's default. The purchaser cannot maintain an action against the solicitor for the return of the deposit, whether he has paid it over to the vendor or not (*k*).

9. A bought goods from B, a broker, and by mistake paid him too much. B gave his principal, who was largely indebted to him, credit for the amount received. Held, that B was liable to repay to A the amount paid in excess, on the ground (1) that B virtually dealt as principal with A, and (2) that the mistake accrued to B's personal benefit (*l*). Where there is no actual change of circumstances to the detriment of the agent in consequence of the payment, the mere fact that he has credited the principal with the amount is not sufficient to discharge him from liability to repay money paid to him under a mistake of fact (*m*).

10. The auctioneer at a sale by auction receives a deposit, and pays it over to the vendor. He is personally liable to refund the amount on the default of the vendor, because it was his duty to hold it as a stakeholder until the completion or rescission of the contract (*n*). But he is not liable to pay interest, however long he may have held the deposit, until it has been demanded, and he has improperly refused to pay it over to the person entitled (*o*)—at all events unless he is shown to have received interest on the money (*p*).

11. An auctioneer sold certain shares by private contract, and received a deposit. The purchaser declined to complete, on the ground that the contract was void as not complying with the provisions of Leeman's Act (*q*), and sued the auctioneer for the return of the deposit. Held, that, the auctioneer having paid over the amount of the deposit to the vendor before the repudiation of the contract, the purchaser was not entitled to recover, because the

(*h*) *Holland v. Russell* (1863), 32 L. J. Q. B. 297; 4 B. & S. 14, Ex. Ch.; *Shand v. Grant* (1863), 15 C. B. (N.S.) 324.

(*i*) *East India Co. v. Tritton* (1824), 5 D. & R. 214.

(*k*) *Ellis v. Goulton*, [1893] 1 Q. B. 350; 62 L. J. Q. B. 232, C. A.; *Bamford v. Shuttleworth* (1840), 11 A. & E. 926; *Hurley v. Baker* (1846), 16 M. & W. 26.

(*l*) *Newall v. Tomlinson* (1871), L. R. 6 C. P. 405.

(*m*) *Buller v. Harrison* (1777), Cowp. 565; *Cox v. Prentice* (1815), 3 M. & S. 344; *Kleinwort v. Dunlop Rubber Co.* (1907), 97 L. T. 263, H. L.; *Scottish Met. Ass. Co. v. Samuel*, [1923] 1 K. B. 348; 92 L. J. K. B. 218.

(*n*) *Burrough v. Skinner* (1770), 5 Burr. 2639; *Gray v. Gutteridge* (1827), 3 C. & P. 40; *Furtado v. Lumley* (1890), 6 T. L. R. 168; *Edwards v. Hodding* (1814), 5 Taunt. 815.

(*o*) *Lee v. Munn* (1817), 1 Moore, 481; 19 R. R. 452; *Gaby v. Driver* (1828), 2 Y. & J. 549. See, however, Law Reform (Miscellaneous Provisions) Act. 1934 (24 & 25 Geo. 5, c. 41), s. 3.

(*p*) *Curling v. Shuttleworth* (1829), 6 Bing. 121, 134.

(*q*) Banking Companies (Shares) Act, 1867 (30 & 31 Vict. c. 39), s. 1.

auctioneer was authorised to pay over the deposit to the vendor either on the completion of the contract or on the purchaser's refusal to complete, and such authority had not been revoked (r).

12. A, a pensioner, collected his pension from the Crown Agents for the Colonies through the defendant bank, by means of receipt forms sent to him by the Crown Agents. Each receipt form contained a certificate that A was still alive. The forms when completed were sent by A to the bank who obtained payment on A's behalf from the Crown Agents and credited A's account with the amount so obtained. A died. Thereafter, receipt forms, containing a forged signature, purporting to be that of A, and a false certificate that A was still living, were sent to the bank by a person pretending to be A, and the bank, believing that the signatures and certificates were genuine and that A was still alive, collected the pension from the Crown Agents and credited the amount to A's account, from which it was withdrawn. The Crown Agents, having discovered that A was dead, sued the bank for the amount of the pension so collected after A's death. Held, that the money could not be recovered as money paid under a mistake of fact, as the bank had paid it over to a person who was their principal, and their belief that such person was A made no difference in this respect (s).

Article 128.

MONEY RECEIVED FOR USE OF THIRD PERSONS.

Where a specific fund (t) existing or accruing in the hands of an agent to the use of his principal, is assigned or charged by the principal to or in favour of a third person, the agent is bound, upon receiving notice of the assignment or charge, to hold the fund, or so much thereof as is necessary to satisfy the charge, to the use of such third party (u).

Where an agent is directed or authorised by his principal to pay to a third person money existing or accruing in his hands to the use of the principal, and he expressly or impliedly contracts with such third person to pay him, or to receive or hold the money on his behalf, or for his use, he is personally liable to pay such third person, or to receive or hold the money on his behalf, or for his use, as the case may be, even if he has had fresh instructions from the principal not to pay such third person (x).

(r) *Galland v. Hall* (1888), 4 T. L. R. 761, C. A. And see *Hindle v. Brown* (1906), 98 L. T. 791, C. A.

(s) *Gowers v. Lloyds, etc., Foreign Bank* (1938), 158 L. T. 467, C. A.

(t) See *Citizens' Bank v. National Bank* (1874), L. R. 6 H. L. 352; 43 L. J. Ch. 269, H. L.

(u) Illustration 1. As to the distinction between an equitable assignment of or charge on a fund, and a mere authority to pay money out of the fund, see Illustrations 1, 5 and 8, and cases there cited. See also *Ex p. Hall, re Whitting* (1879), 10 Ch. D. 615; 48 L. J. Bk. 79, C. A.; *Brandt v. Dunlop Rubber Co.*, [1905] A. C. 454; 74 L. J. K. B. 398, H. L.

(x) Illustrations 2 to 4. *Griffin v. Weatherby* (1866), L. R. 3 Q. B. 753; 37 L. J. Q. B. 280; *Hodgson v. Anderson* (1825), 3 B. & C. 842; *Lilly v. Hays* (1836), 5 A. & E. 548.

Except as in this article provided, no agent is liable or accountable to any third person in respect of money in his hands which he has been directed or authorised to pay to such third person (y).

Illustrations.

1. A principal assigns a specific fund existing or accruing in the hands of his agent to his use, and the assignee gives notice to the agent of the assignment. The agent is bound to account for the fund to the assignee (z), subject to any right of lien or set-off the agent may have against the principal at the time when he receives notice of the assignment (a). So, if a debtor charge a fund in the hands of his agent with payment of the debt, the agent is liable to the creditor upon receiving notice of the charge (z).

2. A principal gives his agent authority to pay money to A, a third person. The agent promises A that he will pay him when the amount is ascertained. The agent is liable to A for the amount when it is ascertained, though in the meantime the principal has become bankrupt (b), or has countermanded his authority (c).

3. A principal writes a letter authorising his agent to pay to A the amounts of certain acceptances, as they become due, out of the proceeds of certain assignments. A shows the letter to the agent, who assents to the terms of it. Before the acceptances fall due, the principal becomes bankrupt, and the agent pays the proceeds of the assignments to the trustee in bankruptcy. The agent is personally liable to A for the amounts of the acceptances as they become due (d).

4. A bill drawn on an agent is made payable out of a particular fund, and the agent promises to pay the holder when he receives money for the principal. The agent is liable to the holder, if he subsequently receive the money (e).

5. An acceptor of a bill pays money to a banker for the purpose of taking up the bill, and the banker promises to apply the money accordingly. The banker refuses to take up the bill, and claims to retain the money for a balance due to him from the acceptor. The drawer of the bill has no right of action, either at law or in equity, against the banker to compel him to apply the money to the payment of the bill, there being no privity of contract between them (f). So, where an agent is authorised to pay a debt out of moneys in his hands, and there is no assignment of or charge on such moneys to or in

(y) Illustrations 5 to 8. *Gibson v. Minet* (1824), 9 Moore, 31; *Wharton v. Walker* (1825), 6 D. & R. 288.

(z) *Webb v. Smith* (1885), 30 Ch. D. 192; 55 L. J. Ch. 343, C. A.; *Ex p. South* (1818), 3 Swan. 392; *Rodick v. Gandell* (1852), 1 De G. M. & G. 763; *Greenway v. Atkinson* (1881), 29 W. R. 580; *Brandt v. Dunlop Rubber Co.*, *supra*, note (u).

(a) *Roxburghe v. Cox* (1881), 17 Ch. D. 520; 50 L. J. Ch. 772, C. A.; *Webb v. Smith*, *supra*.

(b) *Crowfoot v. Gurney* (1832), 2 L. J. C. P. 21; 9 Bing. 372.

(c) *Robertson v. Fauntleroy* (1823), 8 Moore, 10.

(d) *Walker v. Rostron* (1842), 9 M. & W. 411; *Fruhling v. Schroder* (1835), 7 C. & P. 103; *Hamilton v. Spottiswoode* (1849), 4 Ex. 200; 18 L. J. Ex. 393; *Noble v. National Discount Co* (1860), 29 L. J. Ex. 210; 5 H. & N. 225.

(e) *Stevens v. Hill* (1805), 5 Esp. 247; *Langston v. Corney* (1815), 4 Camp. 176.

(f) *Moore v. Bushell* (1857), 27 L. J. Ex. 3; *Hill v. Royds* (1860), L. R. 8 Eq. 290; 38 L. J. Ch. 538; *Johnson v. Roberts* (1875), L. R. 10 Ch. 505; 44 L. J. Ch. 678.

favour of the creditor, the agent is not liable to the creditor, unless he expressly or impliedly contract to pay him, or to hold the money to his use (g).

6. An agent receives money for the express purpose of taking up a bill two days after its maturity. On tendering the money, he finds that the holders have sent back the bill, protested for non-acceptance, to their indorsers. He then receives fresh instructions not to pay. He is not liable to the holders of the bill, not having agreed to hold the money to their use (h). So, where an agent who was authorised to pay money to a third person, offered to pay on a condition to which such third person would not agree, it was held that that was not a sufficient agreement to render him liable to such third person (i).

7. An agent of an executor wrote to a legatee, stating and offering to remit the amount of his legacy, and subsequently remitted the amount, after deducting certain expenses. Held, that the agent had not contracted with the legatee, and was not liable to an action at his instance for the amount so deducted (k).

8. A gives B a cheque on A's banker. The cheque does not operate as an assignment to B of money in the banker's hands belonging to A, and B has no right of action against the banker for wrongfully dishonouring the cheque (l).

Article 129.

PUBLIC AGENTS NOT LIABLE TO THIRD PERSONS FOR MONEY DUE TO THEM.

No public agent is liable or accountable to any third person, either at law or in equity, in respect of any money which as a public agent it is his duty to pay to such third person (m).

This Article applies also to agents of foreign States (n).

Illustrations.

1. The Secretary for War was sued by a retired clerk of the War Office for his retired allowance. Held, that the action would not lie, even if the defendant were shown to have received the money applicable to such allowance (o). Nor will a mandamus lie to the Lords of the Treasury or Secretaries of State to compel them to deal with public moneys in their hands

(g) *Williams v. Everett* (1811), 14 East, 582; *Howell v. Batt* (1833), 2 N. & M. 381; *Malcolm v. Scott* (1850), 5 Ex. 601; *Brind v. Hampshire* (1836), 1 M. & W. 365; *Wedlake v. Hurley* (1830), 1 C. & J. 83; *Bell v. N. W. Ry.* (1852), 15 Beav. 548; *Marrell v. Wootten* (1852), 16 Beav. 197; *Scott v. Porcher* (1817), 3 Meriv. 652.

(h) *Stewart v. Fry* (1817), 1 Moore, 74.

(i) *Baron v. Husband* (1833), 4 B. & Ad. 611.

(k) *Barlow v. Browne* (1846), 16 L. J. Ex. 62; 16 M. & W. 126.

(l) *Schroeder v. Central Bank* (1876), 34 L. T. 735; *Hopkinson v. Forster* (1874), L. R. 19 Eq. 74.

(m) Illustrations 1 and 2. *Salaman v. Secretary of State for India*, [1906] 1 K. B. 613; 75 L. J. K. B. 418, C. A.

(n) *Twycross v. Dreyfus* (1877), 5 Ch. D. 605; 46 L. J. Ch. 510, C. A.; *Henderson v. Rothchild* (1887), 56 L. J. Ch. 471, C. A.

(o) *Gidley v. Palmerston* (1822), 3 B. & B. 275; *Wright v. Mills* (1890), 63 L. T. 186; *Rice v. Chute* (1801), 1 East, 579; cf. *Priddy v. Rose* (1817), 3 Mer. 96; *Row v. Dawson* (1749), 1 Ves. Sen. 331; *Rice v. Everett* (1801), 1 East, 583, n.

according to the provisions of the Appropriation Act or a Royal Warrant. They are answerable to the Crown, and to the Crown alone (p).

2. Booty was granted by the Queen to the Secretary of State for India in Council, in trust to distribute it to those who were found to be entitled thereto. Held, that he, being merely an agent of the Crown to distribute the fund, was not liable to account as a trustee to persons who were entitled to the booty (q). So, a Secretary of State is not accountable as a trustee for funds voted by Parliament, and received by him from the Treasury for the public service (r).

Sect. 3.—*Rights of Agents Against Third Persons.*

Article 130.

RIGHT OF AGENT TO SUE IN OWN NAME ON CONTRACTS MADE BY HIM.

An agent may sue in his own name on contracts made by him on behalf of his principal in the following cases, namely:—

- (a) where he contracts personally (s);
- (b) where, as in the case of factors and auctioneers, he has a special property in, or lien upon, the subject-matter of the contract, or has a beneficial interest in the completion thereof (t);
- (c) in the case of insurance brokers, who may sue in their own names on all policies effected by them (u).

Where a person who enters into a contract professedly as an agent is in fact the real principal, he may sue on the contract—where it has been partly performed or otherwise affirmed by the other contracting party with the knowledge that he is the real principal (x); and

(probably) where the identity of the contracting party is not a material element in the making of the contract, provided that he gives notice to the other contracting party, before action, that he is the real principal (y).

(p) *R. v. Secretary of State for War*, [1891] 2 Q. B. 326; 60 L. J. Q. B. 457, C. A.; *R. v. Treasury* (1872), L. R. 7 Q. B. 387; 41 L. J. Q. B. 178.

(q) *Kinloch v. Secretary of State for India* (1882), 7 App. Cas. 619; 51 L. J. Ch. 885, H. L.

(r) *Grenville-Murray v. Clarendon* (1869), L. R. 9 Eq. 11; 39 L. J. Ch. 221.

(s) Illustrations 1 and 2. *Robertson v. Wait* (1853), 8 Ex. 299; 22 L. J. Ex. 209; *Harper v. Williams* (1843), 4 Q. B. 219; 12 L. J. Q. B. 227; *Agacio v. Forbes* (1861), 14 Moo. P. C. 160; *Joseph v. Knox* (1813), 3 Camp. 320. See Articles 115 to 121, as to when an agent is deemed to contract personally.

(t) Illustration 3. *Snee v. Prescott* (1743), 1 Atk. 248; *Fisher v. Marsh* (1865), 34 L. J. Q. B. 177; 6 B. & S. 411; *Dickenson v. Naul* (1833), 4 B. & Ad. 638.

(u) *Provincial Insurance Co. v. Leduc* (1874), L. R. 6 P. C. 224; 43 L. J. P. C. 49, P. C.; *Oom v. Bruce* (1810), 12 East, 225; *Kensington v. Inglis* (1807), 8 East, 273. See also *Lloyd's v. Harper* (1881), 16 Ch. D. 290; 50 L. J. Ch. 140, C. A.

(x) Illustration 4.

(y) Illustrations 4 to 6. *Bickerton v. Burrell* (1816), 5 M. & S. 383.

Except as in this article provided, no agent can maintain an action in his own name on any contract made by him as such (z), whether the principal be disclosed or undisclosed (z), and whether the agent act under a *del credere* commission or not (a).

Illustrations.

1. A contract was made in the following form: "It is mutually agreed between J. & R. W., of the one part, and S. J. C., on behalf of G. & M. Rail. Co., of the other part, etc." (signed) "J. & R. W., S. J. C." Held, that S. J. C. was entitled to sue in his own name for breach of the contract, he having contracted personally (b).

2. A broker contracted in writing in his own name to buy goods, the seller being told that there was a principal. The broker then, under a general authority from the principal, contracted to resell. On hearing of the last-mentioned contract, the principal refused to have anything to do with the goods, and the broker acquiesced. The seller then refused to deliver. Held, that the broker, having contracted personally, had a right to recover damages for the non-delivery, and that the principal's renunciation of the contract did not affect that right (c).

3. An auctioneer sells A's goods to a buyer who knows that they are A's property. The auctioneer may, nevertheless, sue in his own name for the price, because he has a special property in the goods (d). The right of an auctioneer to sue on a cheque given to him in payment for goods sold is not affected by the fact that the seller was guilty of fraudulent misrepresentations, the auctioneer not being a party to the fraud, and having settled with the principal in ignorance thereof (e).

4. A, professedly as agent for a named principal, contracted in writing to sell certain goods. The buyer, with notice that A was the real principal, accepted and paid for part of the goods. Held, that A might sue for the non-acceptance of the residue (f).

5. A signed a charterparty "as agent for the freighter," a clause being inserted therein limiting A's liability to certain events in view of his being an agent. A was himself the freighter. Held, that he might sue on the contract (the clause limiting his liability would be inoperative). Otherwise, if the other contracting party had relied on his character as agent, and would not have contracted with him had he known him to be the principal. The freighter, whoever he might have been, would have had a right to sue (g).

(z) Illustrations 7 to 12. *Sargent v. Morris* (1820), 3 B. & A. 277; *Gray v. Pearson* (1870), L. R. 5 C. P. 568. See also *Burgos v. Nascimento* (1909), 100 L. T. 71; *Jordeson v. London Hardwood Co.* (1914), 110 L. T. 666; *Flatau v. Keeping* (1931), 36 Com. Cas. 243, C. A.

(a) *Bramwell v. Spiller* (1870), 21 L. T. 672. But see Illustration 13.

(b) *Cooke v. Wilson* (1866), 1 C. B. (n.s.) 153; 26 L. J. C. P. 15; 107 R. R. 607; *Clay v. Southern* (1852), 7 Ex. 717; 21 L. J. Ex. 202; *Brandt v. Morris*, [1917] 2 K. B. 734, C. A.

(c) *Short v. Spackman* (1831), 2 B. & Ad. 962.

(d) *Williams v. Millington* (1788), 1 H. Bl. 81.

(e) *Hindle v. Brown* (1908), 98 L. T. 791, C. A.

(f) *Rayner v. Grote* (1846), 16 L. J. Ex. 79; 15 M. & W. 359.

(g) *Schmaltz v. Avery* (1851), 20 L. J. Q. B. 228; *Harper v. Figers*, [1909] 2 K. B. 549; 78 L. J. K. B. 867. See, however, Illustration 6.

6. A broker signed a contract note, professedly as agent for an undisclosed principal. He was, in fact, acting on his own behalf, but the other contracting party was not aware of that. Held, that he could not sue on the contract, because there was no memorandum thereof to satisfy the Statute of Frauds, s. 17 (*h*). Some of the Judges in this case laid down that he had no right to sue because no contract had been made with him (*i*).

7. A broker sent a contract note in the following form: "I have this day sold you, on account of B, etc." (signed) "A B, broker." Held, that the broker had no right of action in his own name against the buyer for refusing to accept the goods (*k*). So, where a broker sent a contract note as follows: "Mr. L., I have this day bought in my own name for your account, of A. K. T., etc." (signed) "A B, broker"—it was held that he had no right to sue L. for the price (*l*). A broker who makes a contract as such has no right of action in his own name on the contract (except in the case of an insurance broker) unless he has a beneficial interest in the completion thereof; in this respect, a broker differs from a factor or auctioneer, who has a right to sue by reason of his special property in the goods (*m*).

8. A shipmaster signs bills of lading merely as agent for the owners. He cannot sue in his own name for freight due under the bills of lading, not having contracted personally (*n*). Nor can he sue on an implied contract to pay demurrage (*o*).

9. The manager of a mutual insurance association subscribes a policy on behalf of the members of the association. He cannot sue in his own name for contributions due from the member effecting the policy, though the rules of the association purport to give him such a power (*p*).

10. By an agreement in writing, in consideration of the letting of certain tolls by commissioners, A undertook to pay the rent to the treasurer of the commissioners. Held, that the treasurer had no right to sue in his own name for the rent, the contract being made in the names of the principals (*q*).

11. On a sale of land by a corporation, the mayor signed a contract "on behalf of himself and the rest of the burgesses and commonalty of the borough." The conditions provided that the corporation should convey, and a deposit be paid to the mayor. Held, that the mayor could not sue in his own name for breach of the contract (*r*).

12. A bill of exchange is restrictively indorsed to a banker as agent for collection. He cannot sue on the bill (*s*).

(*h*) See now Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 4.

(*i*) *Sharman v. Brandt* (1871), L. R. 6 Q. B. 720; 40 L. J. Q. B. 312, Ex. Ch.

(*k*) *Fairlie v. Fenton* (1870), L. R. 5 Ex. 169; 39 L. J. Ex. 107.

(*l*) *Fawkes v. Lamb* (1862), 31 L. J. Q. B. 98.

(*m*) *Fairlie v. Fenton*, *supra*, note (*k*); *Flatau v. Keeping* (1931), 36 Com. Cas. 243, C. A.

(*n*) *Repetto v. Millar's, etc., Forests*, [1901] 2 K. B. 306; 70 L. J. K. B. 561. Comp. *Cawthron v. Trickett* (1864), 33 L. J. C. P. 182; 13 C. B. (N.S.) 754.

(*o*) *Brouncker v. Scott* (1811), 4 Taunt. 1.

(*p*) *Evans v. Hooper* (1875), 1 Q. B. D. 45; 45 L. J. Q. B. 206, C. A.

(*q*) *Pigott v. Thompson* (1802), 3 B. & P. 147.

(*r*) *Bowen v. Morris* (1810), 2 Taunt. 374, Ex. Ch. And see *Teed v. Elworthy* (1911), 4 East, 210; *Lucas v. Beale* (1851), 20 L. J. C. P. 134; 10 C. B. 739.

(*s*) *Williams v. Shadbolt* (1885), 1 T. L. R. 417.

13. A, acting as *del credere* agent on behalf of B, a timber exporter, sold a cargo of timber to C. A, in accordance with the contract of agency, paid to B the price of the timber, less A's commission; and, in accordance with the contract of sale, C accepted bills of exchange drawn by A for the price of the timber. When the timber arrived, C rejected it on the ground that it was not as specified, and it was found that he was entitled so to do. C dishonoured his acceptances. Held, that A was not the trustee or agent of B in respect of A's rights as holder of the bills of exchange; that there was no failure of consideration for the bills, which were separate contracts between A and C, and were not affected by the failure of consideration under the contract for sale of the timber; and that C was liable to A for the amount of the bills (t).

Article 131.

INTERVENTION OF, OR SETTLEMENT WITH, THE PRINCIPAL.

Except as in this Article provided, the right of an agent to sue on a contract made on behalf of his principal ceases on the intervention of the principal, and a settlement with or set-off against the principal may be set up by way of defence to an action by the agent on the contract (u).

Provided that, where the agent has, as against the principal, a right of lien on the subject-matter of the contract, the right of the agent to sue on the contract has priority, so long as the claim secured by the lien remains unsatisfied, to that of the principal (v); and a settlement with, or set-off against, the principal is no defence to an action by the agent on the contract where such settlement or set-off would operate to the prejudice of the claim secured by the lien, unless the defendant were induced by the terms or conditions of the contract, or by the conduct of the agent, to believe that the agent acquiesced in a settlement being made with the principal, or that the defendant would be entitled to such right of set-off (x).

Illustrations.

1. A shipmaster chartered his ship in his own name, and the owner demanded and received from the charterer the freight due under the contract. Held, that the master could not maintain an action against the charterer for such freight, though he had given him notice not to pay it to anyone but himself (y).

2. A factor sells, in his own name, goods on which he has a lien for advances. While the advances are unpaid, the factor's right to sue the purchaser and compel payment has priority to that of the principal or his trustee in bankruptcy (z).

(t) *Churchill v. Goddard*, [1937] 1 K. B. 92; 105 L. J. K. B. 571, C. A.

(u) Illustration 1. *Sadler v. Leigh* (1815), 4 Camp. 195; *Rogers v. Hadley* (1861), 32 L. J. Ex. 241; 2 H. & C. 227. And see *Dickenson v. Naul* (1833), 4 B. & Ad. 638.

(v) Illustration 2.

(x) Illustrations 3 to 6. And see *Tagart v. Marcus* (1888), 36 W. R. 469.

(y) *Atkinson v. Cotesworth* (1825), 3 B. & C. 647.

(z) *Drinkwater v. Goodwin* (1775), Cowp. 251.

3. A broker sells, in his own name, goods on which he has made advances. The buyer has no right, in an action by the broker for the price, to set off a debt due to him from the principal (a).

4. An auctioneer sued for the price of goods sold and delivered. The defendant pleaded that the plaintiff acted as an auctioneer, and that the defendant had paid the principal for the goods before action. Held, that the plea was bad, because the auctioneer would have had, as against the principal, a lien on the proceeds for charges, etc. (b). The defendant should have shown that, either by the conditions of sale or by facts accruing subsequently, payment to the principal was permitted in discharge of the plaintiff's claim.

5. An auctioneer, on behalf of A, sold goods to B. A was indebted to B, and there was an agreement between them before the sale that the price of any goods bought by B should be set off against the debt, but the auctioneer had no notice of the agreement. The auctioneer permitted B to take away the goods, thinking that he was going to pay for them, B thinking that he was taking them in pursuance of his agreement with A. The auctioneer paid A on account, and after receiving notice of the agreement between A and B, paid A the balance of the proceeds of the sale, such balance exceeding the amount of B's purchases. The auctioneer subsequently sued B for the price of the goods. Held, that, the auctioneer's charges having been paid before action, and he having had notice of the agreement between A and B at the time of his payment to A (exceeding the amount for which he was suing B), the settlement between A and B constituted a good defence (c). Here, the auctioneer was not really prejudiced by the settlement with the principal.

6. Goods belonging to A and B were sold by auction at A's house, and were described in the catalogue as A's property. C bought some of the goods and settled with A, the auctioneer having permitted him to take away the goods without giving him notice not to pay A. D also bought goods and was similarly permitted to take them away. The auctioneer brought actions against C and D. Held, that the settlement between C and A was a good defence (d), and that D was entitled to set off a debt due to him from A (e).

Article 132.

RIGHTS OF DEFENDANT WHERE AGENT SUES IN OWN NAME.

Where an agent sues in his own name on a contract made on behalf of his principal—

(a) any statements which he has himself made, as well as

(a) *Atkyns v. Amber* (1796), 2 Esp. 493.

(b) *Robinson v. Rutter* (1855), 24 L. J. Q. B. 250; 4 E. & B. 954.

(c) *Grice v. Kenrick* (1870), L. R. 5 Q. B. 340; 39 L. J. Q. B. 175. Comp. *Manley v. Berkett*, [1912] 2 K. B. 329; 81 L. J. K. B. 1232.

(d) *Coppin v. Walker* (1816), 2 Marsh. 497.

(e) *Coppin v. Craig* (1816), 2 Marsh. 501. See also *Holmes v. Tutton* (1855), 24 L. J. Q. B. 346; 5 E. & B. 65.

the statements of the principal, may be used in evidence against him (f);

(b) the defendant may avail himself of every defence, including that of set-off, which would have been available against the plaintiff if he had been suing on a contract made on his own behalf, even although the defence would not have been available in an action by the principal on the contract (g); and

(c) the defendant is entitled to discovery to the same extent as if the principal were a party to the action, and to have the action stayed till such discovery is made, even in the case of a foreign principal (h).

Article 133.

RIGHT OF AGENT TO SUE FOR MONEY PAID BY MISTAKE, ETC.

Where an agent pays money on his principal's behalf under a mistake of fact, or in respect of a consideration which fails, or in consequence of some fraud or wrongful act of the payee or otherwise under such circumstances that the payee is liable to repay the money, the agent may in his own name sue the payee for its recovery (i).

Article 134.

NO RIGHT OF ACTION FOR PROMISED BRIBES.

No action can be maintained by an agent for the recovery of any property or money promised to be given to him by way of a bribe, whether he was, in fact, induced by such promise to depart from his duty or not (k).

Sect. 4.—*Liabilities of Agents in Respect of Wrongs Committed on Principal's Behalf.*

Article 135.

AGENT PERSONALLY LIABLE FOR ALL WRONGS COMMITTED BY HIM.

Where loss or injury is caused to any third person, or any penalty is incurred, by any wrongful act or omission of an

(f) *Smith v. Lyon* (1813), 3 Camp. 465; *Bauerman v. Radenius* (1798), 7 T. R. 663; *Welstead v. Levy* (1831), 1 M. & Rob. 138.

(g) *Gibson v. Winter* (1833), 2 L. J. K. B. 130; 5 B. & Ad. 96.

(h) *Willis v. Baddeley*, [1892] 2 Q. B. 324; 61 L. J. Q. B. 769, C. A. See, however, *Portugal (Queen of) v. Glyn* (1837), 7 C. & F. 488, H. L.

(i) *Stevenson v. Mortimer* (1778), Cowp. 805; *Holt v. Ely* (1853), 1 E. & B. 795; *Langstroth v. Toulmin* (1822), 3 Stark. 145; *Colonial Bank v. Exchange Bank* (1885), 11 App. Cas. 84; 55 L. J. P. C. 14, P. C. In such a case, either the principal or the agent may sue.

(k) *Harrington v. Victoria Dock Co.* (1878), 3 Q. B. D. 549; 47 L. J. Q. B. 594; *Laughland v. Millar* (1904), 6 F. 413

agent while acting on behalf of the principal, the agent is personally liable therefor, whether he be acting with the authority of the principal or not, unless the authority of the principal justify the wrong (*l*), to the same extent as if he were acting on his own behalf (*m*).

This Article applies to public agents (*n*): provided that (except as provided by statute) they must be sued individually, and not in their official capacity (*o*): provided also, that no public agent is liable for loss or injury caused to a member, resident abroad, of any foreign State by any act outside the realm authorised or ratified by the Crown or government (*p*).

Illustrations.

1. An agent signed a distress warrant, and after the warrant was issued, but before it was executed, refused a tender of the rent. Held, that the agent was personally liable for the illegal distress (*q*).

2. The manager of a bank signed a letter, as such, falsely and fraudulently representing that the credit of a certain person was good. Held, that the manager was personally liable in an action for deceit (*r*). All persons directly concerned in the commission of a fraud are personally liable, though acting on behalf of others (*s*). But, in the absence of fraud, an agent is not personally liable for misrepresentations made by him on behalf of his principal (*t*).

3. A solicitor who is employed to conduct the sale of an estate conceals an encumbrance from the purchaser. He is personally liable for the concealment (*u*).

4. A solicitor, on his client's instructions, presents a bankruptcy petition against A, knowing that A has not committed any act of bankruptcy. An action is maintainable against the solicitor for maliciously, and without

(*l*) See Illustrations 10 and 11.

(*m*) Illustrations 1 to 12. *Stevens v. Mid. Ry.* (1854), 10 Ex. 352; 23 L. J. Ex. 328 (malicious prosecution). See also Articles 136 and 137. The principal may be liable jointly and severally with the agent. See Articles 102 and 107.

(*n*) Illustration 13. *Hamilton v. Clancy*, [1914] 2 Ir. R. 514 (negligence of sub-postmaster in transmission of telegram). The defence of "act of state" is not available against a British subject: *Entick v. Carrington* (1765), 19 St. Tr. 1030; *Sinclair v. Broughton* (1882), 47 L. T. 170, C. A.

(*o*) *Raleigh v. Goschen*, [1898] 1 Ch. 73; 67 L. J. Ch. 59; *Roper v. Commissioners of Works*, [1915] 1 K. B. 45; 84 L. J. K. B. 219; *Hutton v. Secretary of State for War* (1926), 43 T. L. R. 106. For statutory exceptions, see p. 235, *ante*. Public agents are not liable in their official capacity for the wrongful acts of subordinates: *Bainbridge v. Postmaster-General*, [1906] 1 K. B. 178; 75 L. J. K. B. 366, C. A.

(*p*) *Buron v. Denman* (1848), 2 Ex. 167; 76 R. R. 554; *Salaman v. Secretary of State for India*, [1906] 1 K. B. 613; 75 L. J. K. B. 418; *Johnstone v. Pedlar*, [1921] A. C. 262; 90 L. J. P. C. 181, H. L.

(*q*) *Bennett v. Boyes* (1860), 29 L. J. Ex. 224; 5 H. & N. 391; 102 R. R. 654.

(*r*) *Swift v. Jewesbury* (1874), L. R. 9 Q. B. 301; 43 L. J. Q. B. 56, Ex. Ch.

(*s*) *Cullen v. Thomson* (1862), 4 Macq. H. L. Cas. 424; *Bulkeley v. Dunbar* (1792), 1 Anstr. 37; *Davis v. Carter* (1887), 3 T. L. R. 88; *Brydges v. Branfill* (1841), 12 Sim. 369; 56 R. R. 71.

(*t*) *Eaglesfield v. Londonderry* (1876), 38 L. T. 303, H. L.

(*u*) *Arnol v. Biscoe* (1748), 1 Ves. 95; *Clark v. Hoskins* (1867), 36 L. J. Ch. 689; *Peto v. Blades* (1814), 5 Taunt. 657.

reasonable and probable cause, presenting such petition, and causing A to be adjudged bankrupt (x).

5. A, a printer, is employed to print pictures which are an infringement of copyright. A, though not aware of the infringement of copyright, is liable, as well as his employers, for penalties for the infringement (y).

6. A bailiff, employed to levy a distress, illegally distrains a lodger's goods. He is personally liable under the Law of Distress Amendment Act, 1908 (z).

7. A ship is fitted with pumps which are an infringement of a patent. An injunction may be granted against the master, restraining him from using the pumps, or otherwise infringing the patent (a). But where a custom house agent merely passed through the custom house an article infringing a patent, and obtained permission for landing and storing it in magazines belonging to the principals, who were the importers, it was held that the acts of the agent did not amount to an exercise or user of the patent, and that therefore no action could be maintained against him in respect of the infringement (b).

8. The directors of a company negligently or knowingly (c) pay dividends out of capital. They are jointly and severally liable to the creditors of the company (d).

9. An agent converts goods of a third person to his principal's use. He is liable to the true owner for their value, even if he acted in good faith and in the belief that his principal was the owner (e). If, in such a case, the owner elect to waive the tort, and proceed against the agent for an account, the agent is only liable to account for so much of the proceeds of the converted property as still remains in his hands, and not for what he has duly handed over in the course of his agency to the principal (f).

10. *Agent acting as executor de son tort*.—An agent of an executor *de son tort* collects assets, and pays them over to his principal. The agent is personally liable to account for the assets to the right executor or administrator, or to the beneficiaries (g). But an agent who acts by the authority of an executor (even before probate) or of a person who is subsequently granted letters of administration is not liable to account as an executor *de son tort*, because the title of the executor dates from, and that of the administrator relates back to, the time of the death (h).

(x) *Johnson v. Emerson* (1871), L. R. 6 Ex. 329; 40 L. J. Ex. 201.

(y) *Baschel v. London Illustrated Standard Co.*, [1900] 1 Ch. 73; 69 L. J. Ch. 35. Comp. *Kelly's Directories v. Gavin*, [1902] 1 Ch. 631; 71 L. J. Ch. 405, C. A.

(z) 8 Edw. 7, c. 53, s. 2; *Lowe v. Dorling*, [1906] 2 K. B. 772; 75 L. J. K. B. 1019, C. A., affirming, [1905] 2 K. B. 501, decided under the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 76).

(a) *Adair v. Young* (1879), 12 Ch. D. 13; *Heugh v. Abergavenny* (1874), 23 W. R. 40.

(b) *Nobel's Explosives Co. v. Jones* (1882), 8 App. Cas. 5; 52 L. J. Ch. 339, H. L.

(c) See *Dovey v. Cory*, [1901] A. C. 477; 70 L. J. Ch. 753, H. L.

(d) *Re National Funds Ass. Co.* (1878), 10 Ch. D. 118; 48 L. J. Ch. 163.

(e) *Perkins v. Smith* (1752), 1 Wils. 328; *Cranch v. White* (1835), 4 L. J. C. P. 113; 1 Scott, 314; *Stephens v. Elwall* (1815), 4 M. & S. 259. And see Article 136; Article 72, Illustration 5.

(f) *Re Ely, ex p. Trustee* (1900), 48 W. R. 603, C. A.

(g) *Sharland v. Mildon* (1846), 5 Hare, 469; 15 L. J. Ch. 434; *Padget v. Priest* (1787), 2 T. R. 97; *Coote v. Whittington* (1873), L. R. 16 Eq. 534; 42 L. J. Ch. 846.

(h) *Sykes v. Sykes* (1870), L. R. 5 C. P. 113; 39 L. J. C. P. 179; *Hill v. Curtis* (1866), 35 L. J. Ch. 133.

11. An agent, on behalf of his principal, but without the principal's authority, distrains the goods of a third person. The principal ratifies the distress, which is justifiable at his instance. The agent ceases to be liable, his act being justified by the ratification (i).

12. *Distinction between trespass and case.*—A solicitor, being retained to sue for a debt, by mistake and without malice takes all the proceedings to judgment and execution against another person of the same name as the debtor; or, having obtained judgment against the debtor, by mistake and without malice issues execution against another person of the same name. The solicitor is not liable for the wrongful seizure, unless he directed the sheriff to seize the goods of the wrong person (k). But where a solicitor directs the seizure of particular goods, he is personally liable if the seizure turn out to be wrongful (l). So, where a solicitor directs or personally takes part in the execution of a warrant for arrest, he is liable in an action for false imprisonment, if the warrant be illegal (m). This distinction is founded on the difference between the old actions of trespass and case. Trespass would not lie unless the injury was a direct consequence of the act of the defendant, but malice was unnecessary. Case would lie for indirect injuries, but malice was essential. The distinction is still important, for, although actions are not now classified under particular heads and forms, the Judicature Acts have not created any new causes of action.

13. A public agent threatens to do an act, purporting to be in pursuance of statutory powers, but in fact outside the limits of such powers. He may be restrained by injunction at the instance of a person aggrieved (n).

Article 136.

CONVERSION BY INNOCENT AGENT.

Where an agent has the possession or control of goods, and—

- (a) sells and delivers, or otherwise deals with the possession of and assumes to deal with the property in the goods, without the authority of the true owner (o); or
- (b) refuses without qualification to deliver possession to the true owner on demand (p); or
- (c) transfers possession to his principal or any other person

(i) *Hull v. Pickersgill* (1819), 1 B. & B. 282. And see *Anderson v. Watson* (1827), 3 C. & P. 214.

(k) *Davies v. Jenkins* (1843), 1 D. & L. 321; 12 L. J. Ex. 386; *Childers v. Wooler* (1860), 29 L. J. Q. B. 129; 2 E. & E. 287; *Collins v. Evans* (1844), 5 Q. B. 820, Ex. Ch. Comp. *Clissold v. Cratchley*, [1910] 2 K. B. 244; 79 L. J. K. B. 635.

(l) *Rowles v. Senior* (1846), 8 Q. B. D. 677; *Davies v. Jenkins, supra*; *Meredith v. Flaxman* (1831), 5 C. & P. 99.

(m) *Green v. Elgie* (1843), 5 Q. B. 99; 14 L. J. Q. B. 162; *Codrington v. Lloyd* (1838), 3 A. & E. 449; *Eggington v. Lilahfield* (1855), 24 L. J. Q. B. 360; 5 E. & B. 100.

(n) *Nireaha Tamaki v. Baker*, [1901] A. C. 561; 70 L. J. P. C. 66, P. C. See also *China Mutual Steam Nav. Co. v. Maclay*, [1918] 1 K. B. 33; 87 L. J. K. B. 95.

(o) Illustrations 1 to 6.

(p) Illustration 9.

except the true owner, with notice of the claim of the true owner (*q*)—

he is guilty of conversion and is liable to the true owner for the value of the goods, even if he obtained possession from the apparent owner, and acted in good faith on the authority of the apparent owner (*r*). Provided, that this does not apply to acts done in good faith, and without notice of the claim of the true owner, on the authority of a mercantile agent, or of a buyer or seller, in possession of goods or of the documents of title thereto with the consent of the true owner, within the meaning of the Factors Act, 1889 (*s*). Provided also, that where a banker in good faith, and without negligence, receives payment for a customer of a cheque crossed generally or specially to himself and the customer has no title, or a defective title thereto, the banker does not incur any liability to the true owner of the cheque by reason only of having received such payment (*t*).

But an agent is not guilty of conversion who, in good faith, merely—

- (a) contracts on behalf of his principal to sell goods of which he has neither possession nor control (*u*); or
- (b) by the authority of the apparent owner, and without notice of the claim of the true owner, deals with the possession of, without assuming to deal with the property in, the goods (*x*); or
- (c) refuses to deliver to the true owner goods in his possession by the authority of the apparent owner in such terms that the refusal does not amount to a repudiation of the title of the true owner (*y*).

Illustrations.

1. An auctioneer was instructed to sell by auction furniture which the possessor and apparent owner had assigned by bill of sale to a third person. The auctioneer, who had no notice of the assignment, sold the furniture at the residence of the assignor, and, in the ordinary course of business, delivered it to the purchasers. Held, that the auctioneer was liable to the assignee for the value of the furniture (*z*).

2. A obtained certain goods by fraud. B, a broker, bought the goods in his own name from A, thinking that they would suit C, a customer of his.

(*q*) Illustration 7. *Powell v. Hoyland* (1851), 6 Ex. 67; 20 L. J. Ex. 82; *Union Credit Bank v. Mersey Docks, etc., Board*, [1899] 2 Q. B. 205; 68 L. J. Q. B. 842.

(*r*) Illustrations 1 to 7.

(*s*) 52 & 53 Vict. c. 45; *Shenstone v. Hilton*, [1894] 2 Q. B. 452; 63 L. J. Q. B. 584. But see *Waddington v. Neale* (1907), 96 L. T. 786.

(*t*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 82; Illustration 6.

(*u*) *Turner v. Hockey* (1887), 56 L. J. Q. B. 301; *Barker v. Furlong*, [1891] 2 Ch. 172; 60 L. J. Ch. 368; *Cochrane v. Rymill* (1879), 40 L. T. 744, C. A.

(*x*) Illustration 8. *Union Credit Bank v. Mersey Docks, etc., Board*, [1899] 2 Q. B. 205; 68 L. J. Q. B. 842.

(*y*) Illustration 9.
(*z*) *Consolidated Co. v. Curtis*, [1892] 1 Q. B. 495; 61 L. J. Q. B. 325, C. A.; *Barker v. Furlong*, [1891] 2 Ch. 172; 60 L. J. Ch. 368; *Brown v. Hickinbotham* (1881), 50 L. J. Q. B. 426, C. A.

B, having sold the goods to C at the same price at which he had bought them from A, merely charging the usual commission, took delivery and conveyed the goods to the railway station, whence they were conveyed to C. The jury found that B bought the goods merely as an agent, in the ordinary course of his business. Held, that B was liable to the true owner for the value of the goods (a). Anyone who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or for that of any other person, is guilty of a conversion, and it is no answer to say that he was acting on the authority of another person who himself had no authority to dispose of them (b).

3. A hired certain cabs from B, and obtained advances thereon from an auctioneer. The auctioneer, on A's instructions, and without notice of B's title, in good faith sold the cabs, and after deducting the advances and his expenses, paid the proceeds to A. Held, that the auctioneer was liable to B for the value of the cabs, having had control of them, and having sold them in such a way as to pass the property therein (c). Otherwise, if he had not had possession or control of the cabs, and had merely contracted to sell, without delivering them (c).

4. An insurance broker effected a policy on behalf of A. A became bankrupt, and after the adjudication instructed the broker to collect money due under the policy and pay it to him. The broker, without notice of the bankruptcy, collected the money and paid it to A. Held, that the broker was liable to the trustee in bankruptcy for the amount (d).

5. A banker collects for, and pays over to, a customer the amount of a post-office order, to which the customer has no title. The banker is liable for the amount to the true owner (e).

6. A banker collects a cheque, the indorsement to which has been forged, on behalf of a person who is not a customer of the bank, and who has no title to the cheque. The banker is guilty of conversion of the cheque, and is liable to the true owner for the amount thereof (f). Otherwise, in the case of a banker who, in good faith and without negligence, collects a crossed cheque on behalf of a customer (g).

(a) *Hollins v. Fowler* (1872), L. R. 7 Q. B. 616; 41 L. J. Q. B. 277; affirmed, L. R. 7 H. L. 757; 44 L. J. Q. B. 149, H. L.

(b) *Hollins v. Fowler*, ante; *Union Credit Bank v. Mersey Docks, etc.*, [1899] 2 Q. B. 205; 68 L. J. Q. B. 842.

(c) *Cochrane v. Rymill* (1879), 40 L. T. 744, C. A.; *Barker v. Furlong*, [1891] 2 Ch. 172; 60 L. J. Ch. 368.

(d) *McEntire v. Potter* (1889), 22 Q. B. D. 438; *Pearson v. Graham* (1837), 7 L. J. Q. B. 247; 6 A. & E. 899; 45 R. R. 644.

(e) *Fine Art Society v. Union Bank* (1886), 17 Q. B. D. 705; 56 L. J. Q. B. 70, C. A.
(f) *G. W. Ry. v. L. & C. Bank*, [1901] A. C. 414; 70 L. J. K. B. 915, H. L.; *Arnold v. Cheque Bank* (1878), 1 C. P. D. 578; 45 L. J. C. P. 582; *Kleinwort v. Comptoir National d'Escompte*, [1894] 2 Q. B. 157; 63 L. J. Q. B. 674; *Mathews v. Brown* (1894), 63 L. J. Q. B. 494; *Lacave v. Crédit Lyonnais*, [1897] 1 Q. B. 148; 66 L. J. Q. B. 266; *North and South Wales Bank v. Macbeth*; *Same v. Irvine*, [1908] A. C. 137; 77 L. J. K. B. 464, H. L.

(g) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 82; *Clarke v. L. & C. Banking Co.*, [1897] 1 Q. B. 552; 66 L. J. Q. B. 354; *Akrokerri Mines v. Economic Bank*, [1904] 2 K. B. 465; 73 L. J. K. B. 742; *Importers Co. v. Westminster Bank*, [1927] 2 K. B. 297; 96 L. J. K. B. 919, C. A. A banker receives payment for a customer within the meaning

7. A husband intrusted goods, which were the separate property of his wife, to an auctioneer for sale. The auctioneer received notice of the wife's claim, and subsequently sold a portion of the goods, and permitted the husband to remove the remainder. Held, that the auctioneer was liable to the wife for the value of the goods removed by the husband, as well as of those which had been sold (*h*).

8. A held a bill of sale over horses in the possession of B. B took the horses to C's repository for sale by auction, and they were entered in the catalogue for sale. Before the sale took place, B sold the horses by private contract in C's yard. The price was paid to C, who deducted his commission and charges, and handed the balance to B, and the horses, on B's instructions, were delivered by C to the purchaser. Held, that C, having merely delivered the horses according to B's orders, and not having himself sold or otherwise assumed to deal with the property in them, was not guilty of a conversion (*i*).

9. An agent in possession of goods by the authority of his principal, on demand by the true owner refuses to deliver them up without an order from the principal, or requires a reasonable time to ascertain whether the person demanding the goods is the true owner. Such a qualified refusal is not a conversion. Otherwise, where the refusal is absolute, or amounts to a setting-up of the principal's title to the goods (*k*).

Article 137.

LIABILITY FOR BREACH OF TRUST.

Where an agent, with notice of a trust, deals with trust money or property coming to his hands in a manner or for purposes inconsistent with the trust (*l*), or is otherwise a party to the commission of a breach of trust (*m*), he is personally

of the enactment notwithstanding that he credits the customer's account with the amount of the cheque before receiving payment thereof: Bills of Exchange (Crossed Cheques) Act, 1906 (6 Edw. 7, c. 17), s. 1, making *C. & C. Bank v. Gordon*, [1903] A. C. 240; 72 L. J. K. B. 451, H. L., in this respect not law. But a cheque crossed for the first time by the banker is not a crossed cheque within the meaning of the Act (S. C.). As to negligence, see *Morison v. L. C. & W. Bank*, [1914] 3 K. B. 357; 83 L. J. K. B. 1202, C. A.; *Crumplin v. L. J. S. Bank* (1913), 109 L. T. 856; *Ladbroke v. Todd* (1914), 111 L. T. 43; *Bissell v. Fox* (1885), 53 L. T. 193, C. A.; *Hannan's v. Armstrong* (1900), 5 Corn. Cas. 188; *Bevan v. Nat. Bank*; *Same v. C. & C. Bank* (1906), 23 T. L. R. 65; *Ross v. L. C. W., etc., Bank*, [1919] 1 K. B. 678; 88 L. J. K. B. 927; *Taxation Commrs. v. English, Scottish, etc., Bank*, [1920] A. C. 683; 89 L. J. P. C. 181; *Underwood v. Bank of Liverpool*, [1924] 1 K. B. 775; 93 L. J. K. B. 690, C. A.; *Hampstead Guardians v. Barclays Bank* (1923), 39 T. L. R. 229; *Lloyds Bank v. Chartered Bank*, [1929] 1 K. B. 40; 97 L. J. K. B. 609, C. A.; *Slingsby v. District Bank*, [1932] 1 K. B. 544; 101 L. J. K. B. 281, C. A.; *Midland Bank v. Reckitt*, [1933] A. C. 1; 102 L. J. K. B. 297, H. L. (E.).

(*h*) *Davis v. Artingstall* (1880), 49 L. J. Ch. 609.

(*i*) *National Mercantile Bank v. Rymill* (1881), 44 L. T. 767, C. A.

(*k*) *Alexander v. Southey* (1821), 5 B. & A. 247; *Lee v. Bayes (or Robinson)* (1856), 25 L. J. C. P. 249; 18 C. B. 599; 107 R. R. 424; *Pillott v. Wilkinson* (1864), 34 L. J. Ex. 22; 3 H. & C. 345, Ex. Ch.; *Wilson v. Anderton* (1830), 1 B. & Ad. 450.

(*l*) Illustrations 1 and 2. *Cowper v. Stoneham* (1893), 68 L. T. 18; *Hardy v. Caley* (1864), 33 Beav. 365; *Magnus v. Queensland Bank* (1888), 37 Ch. D. 466; 57 L. J. Ch. 413, C. A.; *Bridgman v. Gill* (1857), 24 Beav. 302.

(*m*) *Att.-Gen. v. Leicester Corpn.* (1844), 7 Beav. 176; *Morgan v. Stephens* (1861), 3 Giff. 226.

liable to the *cestui que trust* in respect of the money or property so dealt with, or for such breach of trust. But an agent who has no knowledge that a breach of trust is being committed is not personally liable merely because he acts, as agent, in a transaction which constitutes a breach of trust (*n*).

Illustrations.

1. A banker transfers trust money from a trust account to the private account of the trustees. He is liable to the beneficiaries for the amount so transferred, whether he acquired any personal benefit from the transaction or not (*o*). No person is permitted to deal with trust funds or property in a manner known by him to be inconsistent with the trust (*o*). Otherwise, if the banker had had no notice that it was trust money (*p*).

2. An agent of an executor applies a fund, which he knows to be part of the estate of the testator, in satisfaction of advances made to the executor for his own business. The agent is personally liable to account for the fund to the beneficiaries under the will (*q*).

Article 138.

AGENTS NOT LIABLE FOR WRONGS OF CO-AGENTS OR SUB-AGENTS.

No agent is liable, as such, to any third person for loss or injury caused by the wrongful act or omission of a co-agent, not being his partner, or of a sub-agent, while acting on behalf of the principal, unless he authorised, or was otherwise party or privy to, such wrongful act or omission (*r*).

(*n*) *Barnes v. Addy* (1873), L. R. 9 Ch. 244; 43 L. J. Ch. 513; *Gray v. Johnston* (1868), L. R. 3 H. L. 1; *Keane v. Roberts* (1819), 4 Madd. 332; *Coleman v. Bucks & Oxon Bank*, [1897] 2 Ch. 243; 66 L. J. Ch. 564; *Williams v. Williams* (1881), 17 Ch. D. 437.

(*o*) *Pannell v. Hurley* (1845), 2 Colly. 241; *Foxton v. Manchester Building Society* (1881), 44 L. T. 406; *Ex p. Kingston, re Gross* (1871), L. R. 6 Ch. 632; 40 L. J. Bk. 91; *Ex p. Adair, re Gross* (1871), 24 L. T. 198; *Bodenham v. Hoskyns* (1852), 2 De G. M. & G. 903; 21 L. J. Ch. 864. Comp. cases cited in note (*n*), above.

(*p*) *Union Bank of Australia v. Murray-Aynsley*, [1899] A. C. 693, P. C.; *Bank of New South Wales v. Goulburn Valley Butter Factory*, [1902] A. C. 543; 71 L. J. P. C. 112.

(*q*) *Wilson v. Moore* (1834), 1 Myl. & K. 127, 337.

(*r*) *Stone v. Cartwright* (1795), 6 T. R. 411; *Bear v. Stevenson* (1874), 30 L. T. 177, P. C.; *Weir v. Bell* (1878), 3 Ex. D. 238; 47 L. J. Ex. 704, C. A.; *Cargill v. Bower* (1878), 10 Ch. D. 502; 47 L. J. Ch. 649; *Re Denham* (1883), 25 Ch. D. 752. See, however, the Companies Act, 1929 (19 & 20 Geo. 5, c. 23), ss. 37, 38, as to the liability of directors, etc., for misrepresentations in a prospectus or notice inviting subscriptions for shares: *Greenwood v. Leather Shod Wheel Co.*, [1900] 1 Ch. 421; 69 L. J. Ch. 131, C. A.; *Gerson v. Simpson*, [1903] 2 K. B. 197; 72 L. J. K. B. 603, C. A.; *Shepherd v. Bray*, [1907] 2 Ch. 571; 76 L. J. Ch. 692, C. A.

CHAPTER XIII.

DETERMINATION OF AGENCY.

Article 139.

DETERMINATION AND REVOCATION OF AGENT'S AUTHORITY.

THE authority of an agent is determined—

- (a) if given for a particular transaction, by the completion of that transaction (a);
- (b) if given for a limited period, by the expiration of that period (b);
- (c) by the destruction of the subject-matter of the agency (c);
- (d) by the happening of any event rendering the agency unlawful (d), or upon the happening of which it is agreed between the principal and agent that the authority shall determine.

The authority of an agent may also be determined, subject to the provisions of Articles 140 to 146,—

- (a) by the death, lunacy, unsoundness of mind, or bankruptcy of the principal or agent (e); or, where the principal is a corporation or incorporated company, by the dissolution of the corporation or company (f);
- (b) by notice of revocation given by the principal to the agent (g);
- (c) by the notice of renunciation given by the agent to the principal (g).

Illustrations.

1. A broker is employed to sell goods. Immediately the contract of sale is completed, he is *functus officio*, and cannot subsequently alter the terms of the contract without fresh authority from the principal (h).

2. A solicitor is retained to conduct an action. In the absence of express agreement to the contrary, his authority to act for the client ceases at the judgment (i).

3. An auctioneer is authorised to sell property. His authority ceases when the sale is completed (k).

(a) Illustrations 1 to 4.

(b) Illustrations 5 and 6.

(c) *Rhodes v. Forwood* (1876), 1 App. Cas. 256; 47 L. J. Ex. 396, H. L.; *Northey v. Trevillion* (1902), 7 Com. Cas. 201.

(d) Illustration 7.

(e) See Articles 142 and 143.

(f) *Salton v. New Beeston Cycle Co.*, [1900] 1 Ch. 43; 69 L. J. Ch. 20.

(g) See Article 144.

(h) *Blackburn v. Scholes* (1810), 2 Camp. 343; 11 R. R. 723.

(i) *Macbeath v. Ellis* (1828), 4 Bing. 578; *Butler v. Knight* (1867), L. R. 2 Ex. 109; 36 L. J. Ex. 66. And see *R. v. Leitrim JJ.*, [1900] 2 Ir. R. 397.

(k) *Seton v. Slade* (1802), 7 Ves. 265, 276. See also Article 9, Illustration 5:

4. A house agent was employed to let or sell a house. Having let the house, he negotiated for a sale, and subsequently found a purchaser. Held, that he had no authority to sell after having let the house, and that he was not entitled to commission on the sale (*l*).

5. A broker is authorised to sell goods. It may be shown that by the custom of the particular trade such an authority expires with the expiration of the day on which it is given (*m*).

6. A stockbroker is instructed to buy or sell stock or shares, subject to fixed limits. His authority *prima facie* ceases at the expiration of the current account (*n*).

7. Where the continuance of the agency may require intercourse with the enemy during a war, the agency is determined by the outbreak of war (*o*); so that the retainer of a solicitor ceases when his client becomes an enemy alien (*p*). And an agency is determined when the operation of Military Service Acts makes it illegal or impossible for the agent to perform his agreement (*q*). But the occurrence of war does not, of itself, determine the agency of a subject of an enemy state resident in this country (*r*); and it has been held that an irrevocable power of attorney to sell land and give a receipt for the purchase money is not avoided by the donor of the power subsequently becoming an alien enemy (*s*).

Article 140.

WHEN AUTHORITY IRREVOCABLE (*t*).

Where the authority of an agent is given by deed (*u*), or for valuable consideration (*x*), for the purpose of effectuating any security (*y*), or of protecting or securing any interest of the agent (*z*), it is irrevocable during the subsistence of such security

(*l*) *Gillow v. Aberdare* (1893), 9 T. L. R. 12, C. A.

(*m*) *Dickinson v. Lilwall* (1815), 4 Camp. 279.

(*n*) *Lawford v. Harris* (1896), 12 T. L. R. 275.

(*o*) See *Soufracht (V/O) v. Van Udens Scheepvaart en Agentuur Matschappij (N. V. Gebr.)*, [1943] A. C. 203, per Lord Porter at pp. 253—255; 112 L. J. K. B. 32; *Stevenson v. Aktiengesellschaft für Cartonnagen-Industrie*, [1918] A. C. 239; 87 L. J. K. B. 416; *Jebara v. Ottoman Bank*, [1927] 2 K. B. 254; 96 L. J. K. B. 581, C. A.; [1928] A. C. 269; 97 L. J. K. B. 502, H. L.

(*p*) *Soufracht, etc. v. Van Udens, etc.*, *ubi supra*. But it has been held that while the solicitor remains upon the record, service upon him is sufficient, although his client has become an enemy alien: *Eichengruen v. Mond*, [1940] 1 Ch. 785, C. A.

(*q*) *Marshall v. Glanville*, [1917] 2 K. B. 87; 86 L. J. K. B. 767.

(*r*) *Nordman v. Rayner* (1916), 33 T. L. R. 87; *Scho stall v. Johnson* (1919), 36 T. L. R. 75. Enemy character depends upon residence, or carrying on business, in enemy territory (*Soufracht, etc. v. Van Udens, etc.*, *supra*).

(*s*) *Tingley v. Müller*, [1917] 2 Ch. 144; 86 L. J. Ch. 625, C. A. This decision was upon its special facts: ordinarily, the relationship of principal and agent necessitates communication between them; see per Lord Porter in *Soufracht, etc. v. Van Udens, etc.*, *ubi supra*.

(*t*) See *Sinfra Aktiengesellschaft v. Sinfra, Ltd.*, [1939] 2 A. E. R. 675, where this Article was cited with approval.

(*u*) Illustrations 1 and 2.

(*x*) Illustrations 3 to 6.

(*y*) *Walsh v. Whitcomb* (1797), 2 Esp. 565; *Smart v. Sandars* (1848), 5 C. B. 895; 17 L. J. C. P. 258.

(*z*) Illustrations 1 to 8. *Alley v. Holson* (1815), 4 Camp. 325.

or interest (a). But it is not irrevocable merely because he has an interest in the exercise of it, or has a special property in, or lien for advances upon, the subject-matter thereof, the authority not being given expressly for the purpose of securing such interest or advances (b).

Where an agent is employed to enter into any contract, or do any other lawful act involving personal liability, and is expressly or impliedly authorised to discharge such liability on behalf of the principal, the authority becomes irrevocable as soon as the liability is incurred by the agent (c).

Where an agent is authorised to pay money on behalf of his principal to a third person, the authority becomes irrevocable as soon as the agent enters into a contract, or otherwise becomes bound, to pay or hold such money to or to the use of such third person (d).

Where an agent has a right to sue on a contract made on behalf of his principal, and would be entitled, as against the principal, to a lien on any money or property recovered in respect of such contract or any breach thereof, the authority of the agent to sue and give a discharge for the money or property recoverable in respect of such contract or breach thereof, is irrevocable during the subsistence of the claim in respect of which he would be entitled to such lien (e).

An authority expressed by this Article to be irrevocable is not determined by the death (f), lunacy, unsoundness of mind, or bankruptcy (g) of the principal, and cannot be revoked by him without the consent of the agent.

Illustrations.

Authority Coupled with an Interest.

1. A, being indebted to B, gives him a power of attorney to sell certain land and discharge his debt out of the purchase-money. The power is irrevocable (h).

(a) See *Chinnock v. Sainsbury* (1860), 30 L. J. Ch. 409; *Frith v. Frith*, [1906] A. C. 254; 75 L. J. P. C. 56, P. C.

(b) Illustrations 3 to 7. *Lepard v. Vernon* (1813), 2 V. & B. 51; 13 R. R. 13; *Frith v. Frith*, *supra*.

(c) Illustration 9. *Read v. Anderson* (1884), 13 Q. B. D. 779; 53 L. J. Q. B. 532, C. A.; *Rhodes v. Fielder* (1919), 89 L. J. K. B. 15; 122 L. T. 128. The importance of this principle is much diminished by the Gaming Act, 1892. See Article 72.

(d) Illustration 10. *Robertson v. Fawntleroy* (1823), 8 Moore, 10; *Burn v. Carvalho* (1838), 9 L. J. Ch. 65; 4 Myl. & C. 690; *Metcalfe v. Clough* (1828), 6 L. J. K. B. 281; 2 M. & R. 178; *Fisher v. Miller* (1823), 7 Moore, 527; *Hodgson v. Anderson* (1825), 3 B. & C. 842; *Hamilton v. Spottiswoode* (1849), 4 Ex. 200; 18 L. J. Ex. 393; *Gardner v. Lachlan* (1838), 4 Myl. & C. 129; 8 L. J. Ch. 82. See Article 128, as to when the agent becomes bound to the third person.

(e) Illustration 11. (f) Illustration 2. *Lepard v. Vernon* (1813), 2 V. & B. 51; *Spooner v. Sandilands* (1842), 1 Y. & Coll. C. C. 390. See, however, *Watson v. King* (1815), 1 Stark. 121, where it was held that a power of attorney, though coupled with an interest, was revoked by the death of the donor.

(g) Illustrations 8, 10 and 11, and cases there cited.

(h) *Gausseu v. Morton* (1830), 10 B. & C. 731. See also *Re Rose, ex p. Hasluck* (1894), 1 Manson, 218; *Gurnell v. Gardner* (1863), 4 Giff. 626.

2. A gave his sister a power of attorney to transfer certain stock, intending to give her the beneficial interest therein. Held, that a transfer executed after A's death in pursuance of the power of attorney was valid (i).

3. Goods are consigned to a factor for sale, with a certain limit as to price. The factor makes advances to the principal, in consideration of his giving him authority to sell at the market price and retain the advances. The authority is irrevocable (k).

4. Goods are consigned to a factor for sale, and he makes advances to the principal on the credit thereof. Subsequently, the principal gives him authority to sell at the market price and retain the advances out of the proceeds. The authority is revocable, not being given for valuable consideration (k).

5. Goods are consigned to a factor for sale. He makes advances, in consideration of an agreement by the principal that his authority to sell shall be irrevocable. The authority is irrevocable (l). It is a question of fact whether such an agreement was made, and it may be inferred from the circumstances (m). In the absence of such an agreement for valuable consideration, the authority of a factor to sell does not become irrevocable by the failure of the principal duly to repay advances made on the security of the goods (l).

6. A signs and addresses to B an underwriting letter by which he agrees, in consideration of a commission, to subscribe for a certain number of shares in a company, and authorises B to apply for the shares in his name and on his behalf. B, being a vendor to the company, and therefore having an interest in the raising of the capital, by letter accepts the terms of A's agreement. The authority given to B to apply for the shares is irrevocable, and A is bound to take the shares applied for and allotted in pursuance of the underwriting letter, although in the meantime he has given notice to B and to the company repudiating the agreement (n).

7. An auctioneer was authorised to sell goods, and after he had incurred expenses in respect thereof, the principal revoked his authority. Held, that the authority of the auctioneer was not irrevocable merely by reason of his special property in the goods and his lien thereon for advances, and that he was liable to the principal in trespass for going to the premises to sell the goods after notice of the revocation (o).

8. The drawer of an accommodation bill, shortly before the bill was due, gave the acceptor money to pay it. He became bankrupt before its maturity. Held, that the authority to pay the bill, being given in performance of an

(i) *Kiddill v. Farnell* (1857), 26 L. J. Ch. 818; 3 Sm. & G. 428.

(k) *Raleigh v. Atkinson* (1840), 6 M. & W. 670.

(l) *Smart v. Sandars* (1848), 5 C. B. 895; 17 L. J. C. P. 258; *De Comas v. Proat* (1865), 3 Moo. P. C. (N.S.) 158, P. C.

(m) *De Comas v. Proat*, *supra*.

(n) *Carmichael's case*, [1896] 2 Ch. 643; 65 L. J. Ch. 902, C. A.; *Re Olympic Reinsurance Co.*, [1920] 2 Ch. 341; 89 L. J. Ch. 544, C. A. *Comp. Re Consort, etc., Gold Mines, Stark's and Elliston's cases*, [1897] 1 Ch. 575; 66 L. J. Ch. 297, C. A.; *Re Bultfontein, etc., Mines*, *ex p. Cox* (1897), 75 L. T. 669, C. A.

(o) *Taplin v. Florence* (1851), 10 C. B. 744.

implied contract of indemnity, was irrevocable, and the acceptor was not liable to refund the amount to the trustee in bankruptcy of the drawer (*p*).

9. *Liability incurred by agent in pursuance of authority*.—A employs B to make a bet on his behalf, and authorises him to pay the bet, if he loses it, out of moneys in his hands belonging to A. The authority becomes irrevocable as soon as the bet is made, provided that B would incur loss in his business or suffer actual damage in the event of the bet not being paid (*q*).

10. An agent is authorised to pay to B the proceeds of a sale of certain goods. The agent assents and promises B that he will pay him, or that he will credit the proceeds to his account. The authority is irrevocable, and is not revoked by the principal's bankruptcy (*r*). It is immaterial that B is indebted to the agent, who retains the proceeds against such debt (*s*).

11. *Authority to sue cannot be revoked to prejudice of agent's lien*.—A factor sells goods on behalf of a principal, who afterwards becomes bankrupt. At the time of the bankruptcy the principal is indebted to the factor in respect of advances. The factor may, as against the principal's trustee in bankruptcy, compel the purchaser to pay the price to him, and may set off the amount of the advances; and his authority to give the purchaser a discharge for the price cannot be revoked by the principal, or by his trustee in bankruptcy (*t*).

Article 141.

POWERS OF ATTORNEY IRREVOCABLE IN FAVOUR OF PURCHASERS FOR VALUE.

Where a power of attorney, created by an instrument executed after December 31, 1882, and given for valuable consideration, is, in the instrument creating it, expressed to be irrevocable, or, whether given for valuable consideration or not, is, in the instrument creating it, expressed to be irrevocable for a fixed time therein specified not exceeding one year from the date of the instrument, then, in favour of a purchaser for valuable consideration—

- (a) the power is not revoked at any time, or during the time fixed (as the case may be), either by anything done by the donor of the power without the concurrence of the donee, or by the death, disability, or bankruptcy of the donor:
- (b) any act done by the donee, in pursuance of the power, at

(*p*) *Yates v. Hoppe* (1850), 19 L. J. C. P. 180; 9 C. B. 541; *Chartered Bank v. Evans* (1869), 21 L. T. 407, P. C. See also *Carter v. White* (1883), 25 Ch. D. 666; 54 L. J. Ch. 138, C. A.

(*q*) Submitted, on the authority of *Read v. Anderson* (1884), 13 Q. B. D. 779; 53 L. J. Q. B. 532, C. A. The principle of this decision still holds good, though the effect of its application is altered by the Gaming Act, 1892 (55 Vict. c. 9). See Article 72.

(*r*) *Crowfoot v. Gurney* (1832), 9 Bing. 372; 2 L. J. C. P. 21; *Walker v. Rostron* (1842) 9 M. & W. 411; *Hutchinson v. Heyworth* (1838), 9 A. & E. 375.

(*s*) *Dickinson v. Marrow* (1845), 14 M. & W. 713.

(*t*) *Drinkwater v. Goodwin* (1775), Cowp. 251; *Robson v. Kemp* (1802), 4 Esp. 233.

any time, or during the time fixed (as the case may be), is as valid as if anything done by the donor without such concurrence, or the death, disability, or bankruptcy of the donor, had not been done or happened:

- (c) neither the donee, nor the purchaser, is at any time prejudicially affected by notice of anything done by the donor without the concurrence of the donee, or of the death, disability, or bankruptcy of the donor, at any time, or during the time fixed (as the case may be) (u).

Article 142.

REVOCATION OF AUTHORITY BY DEATH OR INSANITY.

Subject to the provisions of Articles 140 and 141, the authority of every agent, whether conferred by deed or not, is determined by the death (x), lunacy, or unsoundness of mind (y) of either the principal or the agent; or, where the principal is a corporation or incorporated company, by its dissolution (z).

Illustrations.

1. A undertakes to pay B £100 if B succeeds in selling a picture at a certain price—"no sale, no pay." B endeavours to sell the picture, and after A's death succeeds in doing so. The representatives of A's estate are not bound by the contract of sale (a), but they may ratify it if they think fit (b). Even if the representatives ratify the sale, they are not liable to pay B the £100 unless they ratify his contract with A, but they are liable to pay him a reasonable sum for the services performed (c).

2. A stockbroker had a continuation account open with a client. The client died, and the broker, failing to get instructions from his representatives, carried over the transactions instead of closing them on or before settling day, and ultimately sold the shares at a loss. It was held that the representatives were entitled to stand by the carrying over sale on the first settling day after the death, and that the broker was liable for the subsequent loss (d).

3. A contract of agency for a fixed period is made by or with a firm. The

(u) Law of Property Act, 1925 (15 Geo. 5, c. 20), ss. 126, 127, 205 (1) (xxi).

(x) Illustrations 1 to 4. *Shipman v. Thompson* (1738), Willes, 104, n.; *Farrow v. Wilson* (1869), L. R. 4 C. P. 744; 38 L. J. C. P. 326; *Cottle v. Aldrich* (1815), 4 M. & S. 175; *Phillips v. Jones* (1888), 4 T. L. R. 401; *Houstoun v. Robertson* (1816), 6 Taunt. 448; *Houstoun v. Bordenave* (1816), 6 Taunt. 451. Commission may continue payable after the death of the agent: see Article 65, Illustration 16.

(y) See *Drew v. Nunn* (1879), 4 Q. B. D. 661; 48 L. J. Q. B. 591, C. A.; *Daily Telegraph Newspaper Co. v. M'Laughlin*, [1904] A. C. 776, P. C. As to third persons dealing with the agent, without notice of the insanity, see Article 145, Illustration 2.

(z) Illustration 5. (a) *Blades v. Free* (1829), 9 B. & C. 167.

(b) *Foster v. Bates* (1843), 12 M. & W. 226; 13 L. J. Ex. 88.

(c) *Campanari v. Woodburn* (1854), 15 C. B. 400; 24 L. J. C. P. 13.

(d) *Re Overweg, Haas v. Durant*, [1900] 1 Ch. 209; 69 L. J. Ch. 255.

agency is determined by the death of any one of the partners before the expiration of that period (e).

4. A solicitor is retained to conduct a divorce suit. The retainer ceases on the death of the client pending the proceedings, and the solicitor cannot recover costs subsequently incurred, even when he had no knowledge of his client's death (f).

5. Pending an action against a company, the company was dissolved under the Companies Acts. Held, that the authority of the company's solicitor was determined by the dissolution, though he had no knowledge of it (g).

Article 143.

REVOCATION OF AUTHORITY BY BANKRUPTCY.

Subject to the provisions of Articles 140 and 141, the authority of every agent, whether conferred by deed or not (h), except an authority to do a merely formal act in completion of a transaction already binding on the principal (i), is revoked by the first act of bankruptcy committed by the principal within the three months next preceding the date of the presentation of a bankruptcy petition upon which the principal is afterwards adjudicated bankrupt (k).

Provided always that—

(a) Where the authority is given in the course, and for the protection, of mutual dealings between the principal and the agent (l), it is not revoked by the bankruptcy of the principal, until either the agent has notice of an available (m) act of bankruptcy, or the receiving order is made (n);

(b) every payment or act (o) made to or by, or done by, the agent before the date of the receiving order, is as valid as if his authority had not been revoked by the bankruptcy of the principal, with respect to any third person dealing with him for valuable consideration without notice of any available (m) act of bankruptcy by the principal; and also with respect

(e) *Tasker v. Shepherd* (1861), 6 H. & N. 575; 30 L. J. Ex. 207; *Re Friend, Friend v. Young*, [1897] 2 Ch. 421; 66 L. J. Ch. 737. *Comp. Phillips v. Hull Alhambra*, [1901] 1 K. B. 59; 70 L. J. K. B. 26.

(f) *Pool v. Pool* (1889), 58 L. J. P. 67; *Whitehead v. Lord* (1852), 7 Ex. 691; 21 L. J. Ex. 239.

(g) *Salkon v. New Beeston Cycle Co.*, [1900] 1 Ch. 43; 69 L. J. Ch. 20.

(h) *Markwick v. Hardingham* (1880), 15 Ch. D. 339, C. A.; *Ex p. Snowball, re Douglas* (1872), L. R. 7 Ch. 534; 41 L. J. Bk. 49. (i) Illustration 5.

(k) Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 37; Illustrations 1 to 4.

(l) Illustration 6.

(m) I.e., an act of bankruptcy, committed within the three months next preceding the presentation of the petition whereon the receiving order is made: Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), ss. 4 (1) and 167. (n) Illustration 6.

(o) Payment or delivery to, or payment, conveyance, assignment, contract, dealing, or transaction by or with the agent.

to the agent provided that at the time when the payment or act is made or done he has no notice of any such act of bankruptcy (*p*).

The question whether the authority of an agent is revoked by his bankruptcy depends upon the nature and terms of his employment (*q*).

Illustrations.

1. An agent has a general authority to sell and deliver goods belonging to his principal. The principal commits an act of bankruptcy. The authority of the agent is revoked by the act of bankruptcy, provided that the principal is subsequently adjudicated bankrupt upon a petition presented within three months after the date thereof (*r*); and if the agent sell the goods after receiving notice of the act of bankruptcy, he is liable to the trustee in bankruptcy for the value of the goods, or for the proceeds, at the option of the trustee (*s*).

2. An agent, in obedience to the instructions of his principal, pays away money belonging to the principal after receiving notice that he has committed an act of bankruptcy. The principal is adjudicated bankrupt upon a petition presented within three months after the act of bankruptcy. The agent is personally liable to repay to the trustee in bankruptcy the amount so paid away (*t*). So, if a banker pay the cheques of a customer after receiving notice that the customer has committed an act of bankruptcy, he cannot charge the customer with, nor prove in the bankruptcy for, the amounts so paid (*u*).

3. An agent, by the direction of his principal, makes a payment which the agent knows will, when completed, constitute an act of bankruptcy by the principal. The agent is not liable to the trustee in the subsequent bankruptcy merely by reason of the payment so made, because the act of bankruptcy had not been committed at the time when the payment was made (*x*).

4. A solicitor is authorised to conduct certain proceedings, and a sum of money is paid to him by the client for that purpose. The solicitor incurs expenses and costs, and then, after receiving notice of an act of bankruptcy by the client, appears on his behalf in opposition to a bankruptcy petition. The client is adjudicated bankrupt. The solicitor must repay to the trustee in bankruptcy the amount received from the bankrupt, after deducting the costs and expenses incurred prior to the notice of the act of bankruptcy (*y*).

(*p*) *Ibid.*, s. 45; Illustrations 4, 7 and 8.

(*q*) See *McCall v. Australian Meat Co.* (1870), 19 W. R. 188; *Phelps v. Lyle* (1840), 8 L. J. Q. B. 236; 10 A. & E. 113; *Hudson v. Granger* (1821), 5 B. & A. 27.

(*r*) *Pearson v. Graham* (1837), 6 A. & E. 899; 7 L. J. Q. B. 247; *Kynaston v. Crouch* (1845), 14 L. J. Ex. 324; 14 M. & W. 266; Bankruptcy Act, 1914 (4 & 5 Geo. 5 c. 59), s. 37. See also *McEntire v. Potter* (1889), 22 Q. B. D. 438.

(*s*) *King v. Leith* (1787), 2 T. R. 141.

(*t*) *Re Lamb, ex p. Gibson* (1887), 55 L. T. 817.

(*u*) *Vernon v. Hankey* (1787), 2 T. R. 113; *Hankey v. Vernon* (1787), 3 Bro. C. C. 313; *Ex p. Sharp* (1844), 3 M. D. & De G. 490.

(*x*) *Ex p. Helder, re Lewis* (1883), 24 Ch. D. 339.

(*y*) *Re Whitlock* (1893), 63 L. J. Q. B. 245; *Re Pollitt*, [1893] 1 Q. B. 455; 62 L. J. Q. B. 236, C. A.; *Re Beyts* (1894), 70 L. T. 561; *Re Mander, ex p. O. R.* (1902), 86 L. T. 234; *Re A Debtor*, [1937] Ch. 92; 106 L. J. Ch. 193. Comp. *Re Charlwood*, [1894] 1 Q. B. 643; 63 L. J. Q. B. 344.

5. An agent was by power of attorney given authority to execute an endorsement of sale on the register of a ship when she returned home. Held, that the power was not revoked by the bankruptcy of the donor, the act being merely a formal one, which the principal, though a bankrupt, might have been compelled to do (z).

6. An agent is authorised to receive the purchase-money of an estate and place it to the credit of the principal in an account of mutual dealings between the principal and agent. The agent receives the money after an act of bankruptcy by the principal, but before the date of the receiving order, without notice of the act of bankruptcy. The money becomes an item in the account between the principal and agent, and may be set off by the agent as against the trustee in bankruptcy (a).

7. After an act of bankruptcy, but before the date of the receiving order, property of the bankrupt is conveyed to a purchaser for valuable consideration, in pursuance of a power of attorney given by the bankrupt, the purchaser acting in good faith, without notice of the act of bankruptcy. The purchaser has a good title as against the trustee in bankruptcy (b).

8. An agent, on behalf of his principal, enters into a contract after an act of bankruptcy by the principal, but before the date of the receiving order, the other contracting party having had no notice of any act of bankruptcy by the principal. The contract is as valid against the trustee in bankruptcy as it would have been against the principal if he had not become bankrupt (c).

Article 144.

DETERMINATION OF AUTHORITY BY NOTICE OF REVOCATION OR RENUNCIATION.

Subject to the provisions of Articles 140 and 141, the authority of an agent, whether conferred by deed or not (d), is determined by the principal giving to the agent notice of revocation at any time before the authority has been completely exercised (e), or by the agent giving to the principal notice of renunciation; but without prejudice to any claim for damages that the principal or agent may have against the other for breach of the contract

(z) *Dixon v. Ewart* (1817), Buok, 94.

(a) *Elliott v. Turquand* (1881), 7 App. Cas. 79; 51 L. J. P. C. 1, P. C., as qualified by Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 31. A delivery of property to an agent, with authority to convert it into money and receive the proceeds, is giving credit to the agent within the meaning of the mutual credit clause of the Bankruptcy Act, 1914, and he is entitled, on the bankruptcy of the principal, to exercise the right of set-off given by that clause, though the authority has not been exercised and the property is still unconverted at the time of the bankruptcy: *Naoroji v. Bank of India* (1868), L. R. 3 C. P. 444; 37 L. J. C. P. 221; *Astley v. Gurney* (1869), L. R. 4 C. P. 714; 38 L. J. C. P. 357. Ex. Ch.; *Palmer v. Day*, [1895] 2 Q. B. 618; 64 L. J. Q. B. 807.

(b) *Per cur.* in *Ex p. Snoball, re Douglas* (1872), L. R. 7 Ch. 534; 41 L. J. Bk. 49 as qualified by Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 45.

(c) *Ex p. MacDonnell* (1819), Buok. 399, as qualified by Bankruptcy Act, 1914 4 & 5 Geo. 5, c. 59), s. 45.

(d) Illustration 1. *Bromley v. Holland* (1802), 7 Ves. 28.

(e) Illustrations 2 to 6. *Freeman v. Fairlie* (1838), 8 L. J. Ch. 44.

of agency (f). Where the authority is conferred by two or more principals jointly, it is sufficient if the notice of revocation or renunciation be given by or to any one of the principals (g).

Illustrations.

1. An indenture of lease provided that an agent therein named should have authority to receive the rent on behalf of the lessor, and that his receipt should be a sufficient discharge, during the term thereby granted. Held, that the lessor might revoke the authority during the term, the agent having no interest in the rent (h). An authority, though given by deed, may be revoked by a verbal notice of revocation (i).

2. An auctioneer is authorised to sell certain goods by auction. His authority may be revoked by the principal at any time before the goods are knocked down to a purchaser (k). So, where a broker is authorised to buy or sell goods, the authority may be revoked at any time before the contract of purchase or sale is completed, and where writing is necessary, even after he has verbally contracted to buy or sell the goods (l). And, where a broker is authorised to effect a marine insurance policy, the authority may be revoked even after the underwriters have signed the slip, the contract, in consequence of the Stamp Act, 1891 (m), ss. 93 and 97, not being binding until the policy is executed (n).

3. An agent undertakes to endeavour to sell a picture, and it is agreed that he shall receive remuneration only in the event of a sale. His authority may be revoked after endeavours by him to sell the picture (o).

4. Money is deposited with A, to be applied for the use of the poor. The authority may be countermanded at any time before the application of the money, and the money be recovered by the principal from A (p). So, money received by an army agent from the Crown for officers' pay may be recalled by the Crown at any time before it has been paid to the officers, or the agent has contracted to hold it to their use, though he may have carried it to their credit in his books (q).

5. Money is deposited with a stakeholder, to be paid to the winner of a wager. The authority of the stakeholder may be revoked at any time before

(f) See Articles 44, 58 and 67. *Bovine v. Dent* (1904), 21 T. L. R. 82. A contract of agency may be determined at will, in the absence of agreement, express or implied, to the contrary: *Alexander v. Davis* (1885), 2 T. L. R. 142; *Henry v. Lowson* (1886), 2 T. L. R. 199; *Motion v. Michaud* (1892), 8 T. L. R. 447, C. A.; *Barrett v. Gilmour* (1901), 6 Com. Cas. 72; *Joynton v. Hunt* (1905), 93 L. T. 470, C. A.

(g) *Bristow v. Taylor* (1817), 2 Stark. 50.

(h) *Venning v. Bray* (1862), 31 L. J. Q. B. 181; 2 B. & S. 502. And see *Doward v. Williams* (1890), 6 T. L. R. 316.

(i) *The Margaret Mitchell* (1858), Swa. 382; *R. v. Wait* (1823), 11 Price, 518.

(k) *Warlow v. Harrison* (1859), 1 E. & E. 309; 29 L. J. Q. B. 14, Ex. Ch.; *Manser v. Back* (1848), 6 Hare, 443; *Re Hare and O'More's Contract*, [1901] 1 Ch. 93; 70 L. J. Ch. 45.

(l) *Farmer v. Robinson* (1805), 2 Camp. 338, n. (m) 54 & 55 Vict. c. 39.

(n) *Warwick v. Slade* (1811), 3 Camp. 127. This applies only to contracts of marine insurance: *Thompson v. Adams* (1889), 23 Q. B. D. 361.

(o) *Campanari v. Woodburn* (1854), 15 C. B. 400; 24 L. J. C. P. 13.

(p) *Taylor v. Lendey* (1807), 9 East, 49.

(q) *Brummell v. M^{rs} Pherson* (1828), 5 Russ. 263.

he has actually paid over the money to the winner, and if he pay it over after notice of revocation he is personally liable to the depositor for the amount (r). So, where authority is given to pay money, in respect of an unlawful transaction, the authority may be revoked at any time before the money has been paid over, even after it has been credited in account (s).

6. A authorised his banker to hold £20 at the disposal of B. The authority of the banker may be countermanded, provided that he has not paid the money to B, nor contracted with him to hold it on his behalf (t).

Article 145.

WHEN NOTICE OF REVOCATION TO THIRD PERSONS NECESSARY.

Where a principal, by words or conduct, represents, or permits it to be represented, that an agent is authorised to act on his behalf, he is bound by the acts of the agent, notwithstanding the determination of the authority otherwise than by the death (u) or bankruptcy (x) of the principal, to the same extent as he would have been if the authority had not been determined, with respect to any third person dealing with the agent on the faith of any such representation, without notice of the determination of his authority (y).

Illustrations.

1. A authorises B to purchase goods on his credit, and holds him out to C as his agent for that purpose. C supplies goods to B, on A's credit, after revocation by A of B's authority to act on his behalf, C having had no notice of such revocation. A is liable to C for the price of the goods, even if B contracted on his own behalf, and did not intend to bind A (z). Where a person holds out another as his agent, the person to whom that other is so held out is justified in dealing with him as such, until he receives notice that the authority has been revoked (a).

2. A husband holds out his wife as having authority to pledge his credit, and subsequently becomes insane. A tradesman, on the faith of such holding

(r) *Hampden v. Walsh* (1876), 1 Q. B. D. 189; 45 L. J. Q. B. 238; *Batson v. Newman* (1876), 1 C. P. D. 573, C. A.; *Diggie v. Higgs* (1877), 2 Ex. D. 422; 46 L. J. Ex. 721, C. A.; *Trimble v. Hill* (1879), 5 A. C. 342; 49 L. J. P. C. 49, P. C.; *Gatty v. Field* (1846), 9 Q. B. 431. These cases are not affected by the Gaming Act, 1892 (55 & 56 Vict. c. 9): *O'Sullivan v. Thomas*, [1895] 1 Q. B. 698; 64 L. J. Q. B. 398; *Shoolbred v. Roberts*, [1900] 2 Q. B. 497; 69 L. J. Q. B. 800, C. A.; *Burge v. Ashley*, [1900] 1 Q. B. 744; 69 L. J. Q. B. 538, C. A.

(s) *Edgar v. Fowler* (1803), 3 East, 222; *Smith v. Bickmore* (1812), 4 Taunt. 474; *Taylor v. Bowers* (1876), 1 Q. B. D. 291; 45 L. J. Q. B. 163, C. A.; *Hastelow v. Jackson* (1828), 8 B. & C. 221.

(t) *Gibson v. Minet* (1824), 9 Moo. 31.

(u) See Illustration 4.

(x) See Article 143, as to revocation by bankruptcy.

(y) Illustrations 1 to 3. *Pole v. Leask* (1862), 33 L. J. Ch. 155, H. L.; *Scarf v. Jardine* (1882), 7 App. Cas., at p. 349, H. L.; *Curlewis v. Birkbeck* (1863), 3 F. & F. 894; — v. *Harrison*, 12 Mod. 346; *Ryan v. Sams* (1848), 12 Q. B. 460; 17 L. J. Q. B. 271.

(z) *Trueman v. Loder* (1840), 11 A. & E. 589.

(a) *Slaveley v. Uzielli* (1860), 2 F. & F. 30; *Ex p. Bright* (1832), 2 Dea. & Ch. 8; *Aste v. Montague* (1858), 1 F. & F. 264; *Willis v. Joyce* (1911), 194 L. T. 576.

out, supplies goods to the orders of the wife, without notice of the husband's insanity. The husband is liable for the price of the goods (b).

3. A policy was effected through the local agent of an insurance company and notice of a loss was given to him after he had ceased to represent the company. Held, that that was notice to "a known agent of the company" within the meaning of the policy, the assured having no knowledge of the determination of the agency (c).

4. A widow ordered necessities from a tradesman to whom she had been held out by her deceased husband as having authority to pledge his credit, the tradesman having had no notice of the death. Held, that the estate of the husband was not liable for the price of the goods (d).

Article 146.

PROTECTION OF AGENT ACTING UNDER POWER OF ATTORNEY WITHOUT NOTICE OF REVOCATION.

Where a person makes any payment or does any act in good faith, in pursuance of a power of attorney, he is not liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become subject to disability, or bankrupt, or had revoked the power, if the fact of death, disability, bankruptcy, or revocation were not at the time of the payment or act known to the person making or doing the same. But this does not affect any right against the payee, of any person interested in any money so paid; and that person has the like remedy against the payee as he would have had against the payer if the payment had not been made by him (e).

(b) *Drew v. Nunn* (1879), 4 Q. B. D. 661; 48 L. J. Q. B. 501, C. A.

(c) *Marsden v. City and County Ass. Co.* (1865), L. R. 1 C. P. 232; 35 L. J. C. P. 60.

(d) *Blades v. Free* (1829), 9 B. & C. 167. See, however, judgment of Brett, L.J., in *Drew v. Nunn*, *supra*.

(e) Trustee Act, 1925 (15 Geo. 5, c. 19), s. 29; Law of Property Act, 1925 (15 Geo. 5, c. 20), s. 124.

CHAPTER XIV.

CRIMINAL LIABILITY OF PRINCIPAL FOR ACTS OF AGENT.

Article 147.

EXCEPT where otherwise expressly or by necessary implication provided by statute or in the case of a public nuisance (a) no principal is criminally liable for any act or omission of his agent, unless he authorised or connived at such act or omission (b).

Illustrations.

1. The master of a British ship overloaded her without the assent or knowledge of the owner. Held, that the owner was not liable to the penalty imposed by the Merchant Shipping Act, 1876 (c).

2. Gaming is carried on upon licensed premises to the knowledge of the servant left in charge of the premises, but without the knowledge or connivance of the licensee. The licensee has suffered gaming to be carried on upon the premises, within the meaning of the Licensing (Consolidation) Act, 1910, s. 79 (d). Similarly, the proprietor of a restaurant was held responsible for the acts of his manager in harbouring prostitutes, contrary to the Metropolitan Police Act, 1839, s. 44 (e). But the knowledge of a servant is not sufficient, unless he is in charge of the premises or of the part where gaming is carried on (f).

3. A licensee is not liable under the Licensing (Consolidation) Act, 1910, s. 68 (g), for the act of a servant who knowingly sells intoxicating liquor in a bottle which is not corked and sealed to a child under the age of fourteen years, without the knowledge or connivance of the licensee, or of the person in charge of the licensed premises (h); nor is he liable under the Licensing Act, 1921, s. 4 (i), for the act of a servant who without such knowledge or connivance sells liquor after permitted hours, where the servant has no

(a) See Illustration 8.

(b) *Dickenson v. Fletcher* (1873), L. R. 9 C. P. 1; 43 L. J. M. C. 25; *Hardcastle v. Bielby*, [1892] 1 Q. B. 709; 61 L. J. M. C. 101; *Taylor v. Nizon*, [1910] 2 Ir. R. 94; *Wake v. Dyer* (1911), 104 L. T. 448. And see Illustrations.

(c) 39 & 40 Vict. c. 80, s. 28; *Massey v. Morris*, [1894] 2 Q. B. 412; 63 L. J. M. C. 185. See now the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 442.

(d) 10 Edw. 7 & 1 Geo. 5, c. 24; *Redgate v. Haynes* (1876), 1 Q. B. D. 89; 45 L. J. M. C. 65; *Bond v. Evans* (1888), 21 Q. B. D. 249; 57 L. J. M. C. 105.

(e) 2 & 3 Vict. c. 47; *Allen v. Whitehead*, [1930] 1 K. B. 211; 99 L. J. K. B. 146.

(f) *Somerset v. Hart* (1884), 12 Q. B. D. 360; 53 L. J. M. C. 77.

(g) 10 Edw. 7 & 1 Geo. 5, c. 24. The section enacts that the licensee "shall not knowingly sell or deliver or allow any person to sell or deliver" in the manner prohibited.

(h) *Emary v. Nolloth*, [1903] 2 K. B. 284; 72 L. J. K. B. 620; *Conlon v. Muldowney*, [1904] 2 Ir. R. 498; *McKenna v. Harding* (1905), 69 J. P. 354; *Allchorn v. Hopkins* (1905), 69 J. P. 355; *Groom v. Grimes* (1903), 89 L. T. 129.

(i) 11 & 12 Geo. 5, c. 42. The prohibition is that "no person shall . . . by himself or by any servant or agent, sell," etc.

authority to sell any liquor (*k*). But if a servant knowingly supply liquor to a constable on duty, the licensee, although he had no knowledge of the servant's act, is liable to be convicted under the Licensing (Consolidation) Act, 1910, s. 78 (*l*). So, where the servant supplies a drunken person (*m*).

4. A, who was licensed to sell beer by retail at the premises of a brewery company, for consumption off the premises, gave instructions to the draymen, who delivered beer to customers who had given orders for it at the company's office, not to deliver to any persons who had not given such previous orders, and took reasonable care to prevent any infringement of such instructions. The beer was sold for cash on delivery, and no appropriation was made of bottles or crates to any particular customers. One of the draymen sold beer for cash in the street to persons who had not sent previous orders. It was held that such sales were outside the scope of the drayman's employment, and that A was not liable to be convicted under section 3 of the Licensing Act, 1872 (*n*), for having sold intoxicating liquor at an unlicensed place (*o*).

5. A servant in charge of a vehicle containing coal misrepresents to an inspector appointed under the Weights and Measures Act, 1889 (*p*), the quantity of coal contained in the sacks. The employer is not liable to the penalty imposed by section 29 of that Act for such misrepresentation (*q*).

6. A servant of a milk salesman, in the course of his employment, sells adulterated milk. The master is liable to be convicted as a seller of adulterated milk under the Food and Drugs (Adulteration) Act, 1928, s. 2 (*r*), whether he authorised or connived at the adulteration or not (*s*). So, where a servant, by mistake, sold a mixture of butter and margarine as butter (*t*). But the master is not so liable, where the servant has no authority to make any sale (*u*). So, a master or principal is liable under the Merchandise Marks Act, 1887 (*x*), for offences within section 2 of the Act committed by his servants or agents in the course of their employment (*y*).

(*k*) *Adams v. Camfoni*, [1929] 1 K. B. 95; 98 L. J. K. B. 40; see also *Whittaker v. Forshaw*, [1919] 2 K. B. 419; 88 L. J. K. B. 989 (sale of milk to inspector without authority); *Star Cinema v. Baker* (1921), 126 L. T. 506 (sale of ticket by unauthorised attendant); *Wilson v. Murphy* (1937), 81 S. J. 139 (unauthorised collection of money for football pool).

(*l*) *Mullins v. Collins* (1874), L. R. 9 Q. B. 292; 43 L. J. M. C. 67. The offence is for a licensee to "supply any liquor . . . to any constable on duty," etc.

(*m*) *Police (Commissioner) v. Cartman*, [1896] 1 Q. B. 355; 65 L. J. M. C. 113. (*n*) 35 & 36 Vict. c. 94. See now Licensing (Consolidation) Act, 1910 (10 Edw. 7 & 1 Geo. 5, c. 24), s. 65; Licensing Act, 1921 (11 & 12 Geo. 5, c. 42), s. 7.

(*o*) *Boyle v. Smith*, [1906] 1 K. B. 432; 75 L. J. K. B. 282. Comp. *Stansfeld v. Andrews* (1909), 100 L. T. 529, where the licensee was convicted of aiding and abetting his servant in the illegal sale. (*p*) 52 & 53 Vict. c. 21.

(*q*) *Roberts v. Woodward* (1890), 25 Q. B. D. 412; 59 L. J. M. C. 129. And see *Anglo-American Oil Co. v. Manning*, [1908] 1 K. B. 536; 77 L. J. K. B. 205, where it was held that the possession by a servant of a false measure for his own fraudulent purposes was not, in the circumstances, the possession of his master.

(*r*) 18 & 19 Geo. 5, c. 31. (*s*) *Brown v. Foot* (1892), 66 L. T. 649. And see *Collman v. Mills*, [1897] 1 Q. B. 396; 66 L. J. Q. B. 170 (slaughter of sheep in contravention of a bye-law).

(*t*) *Houghton v. Mundy* (1910), 103 L. T. 60.

(*u*) *Whittaker v. Forshaw*, [1919] 2 K. B. 419; 88 L. J. K. B. 989.

(*x*) 50 & 51 Vict. c. 28.

(*y*) *Coppen v. Moore*, [1898] 2 Q. B. 306; 67 L. J. Q. B. 689. See also *Mousell v. L. & N. W. Ry.*, [1917] 2 K. B. 837; 87 L. J. K. B. 82 (offences under the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), ss. 98 and 99, of giving false accounts

7. A manufacturer was summoned under the Smoke Nuisance (Metropolis) Act, 1853, ss. 1 and 2 (z), for negligently using a furnace so that the smoke was not consumed. The furnace was constructed so as to consume the smoke, if properly used, but the stoker employed to attend to it had been careless. Held, that the defendant was not criminally liable for the negligence of the stoker, and could not be convicted (a). Otherwise, if he had been summoned under the Public Health Act, 1875, s. 96 (b).

8. An owner of works carried on for his profit by his agent is liable to be convicted in respect of a public nuisance proceeding from the premises, though the nuisance is caused by acts of the workmen, done without his knowledge and contrary to his general orders (c). An indictment for a public nuisance is a *quasi*-civil proceeding intended to prevent a recurrence thereof (c).

9. A trader harbours and conceals smuggled goods. He is liable to penalties for an illegal act done by his servant, in the conduct of the business, to protect the smuggled goods, though the act was done in his absence and on the exigency of the occasion (d).

Corporations.

A corporation aggregate cannot be convicted of certain criminal offences, such as treason or other offences for which death or imprisonment is the only punishment (e); or of felony (f); or of a crime involving personal violence (g); or of perjury (h). But it may be indicted for a misdemeanour which consists of breach of a duty imposed on it by law, for example, non-repair of a highway (i); or for a nuisance (k); or for a misfeasance such as obstruction of a highway (l); or for libel (m), even where express malice is a necessary element in guilt (n); or for conspiracy to defraud (nn).

The Interpretation Act, 1889, s. 2 (1) (o), provides that in the construction of every enactment relating to an offence punishable on indictment or summary conviction, whether contained in an Act passed before or after the commence-

with intent to avoid payment of tolls); *Warrington v. Windhill, etc., Socy.* (1918), 118 L. T. 505 (sale of food, contrary to a Food Order).

(z) 16 & 17 Vict. c. 128 (repealed). See now the Public Health (London) Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 50), s. 147.

(a) *Chisholm v. Doulton* (1889), 22 Q. B. D. 736; 58 L. J. M. C. 133. *Comp. Armitage v. Nicholson* (1913), 108 L. T. 993 (offence under local Act).

(b) 38 & 39 Vict. c. 55 (repealed). *Niven v. Greaves* (1890), 54 J. P. 548. See now Public Health Act, 1936 (26 Geo. 5 & 1 Edw. 8, c. 49), s. 94.

(c) *R. v. Stephens* (1865), L. R. 1 Q. B. 702; *Barnes v. Akroyd* (1872), L. R. 7 Q. B. 474; 41 L. J. M. C. 110.

(d) *Att.-Gen. v. Siddon* (1830), 1 C. & J. 220; 35 R. R. 701. See also *Att.-Gen. v. Riddle* (1832), 2 C. & J. 493.

(e) *Director of Public Prosecutions v. Kent and Sussex Contractors, Ltd.*, [1944] 1 K. B. 146, per Lord Caldecote, L.C.J. at p. 149; 113 L. J. K. B. 88.

(f) *R. v. Birmingham and Gloucester Ry. Co.* (1842), 3 Q. B. 223, per Patteson, J.

(g) *Ibid.*; *R. v. Cory Bros. & Co.*, [1927] 1 K. B. 810; 90 L. J. K. B. 761.

(h) *Wych v. Neal* (1734), 3 P. Wms. 310.

(i) *R. v. Birmingham etc., Ry. Co.*, *supra*.

(k) *Pharmaceutical Society v. London and Provincial Supply Association* (1880). 5 App. Cas. 857, per Lord Blackburn at p. 870.

(l) *R. v. Great North of England Ry. Co* (1846), 9 Q. B. 315.

(m) *Whitfield v. South Eastern Ry. Co.* (1858), E. B. & E. 115; 27 L. J. Q. B. 229.

(n) *Triplex Safety Glass Co., Ltd. v. Lancegaye Safety Glass* (1934), *Ltd.*, [1939] 2 K. B. 395; 108 L. J. K. B. 783, C. A.

(nn) *R. v. I. C. R. Haulage, Ltd.*, [1944] W. N. 135, C. C. A.

(o) 52 & 53 Vict. c. 63.

ment of that Act, the expression "person" shall, unless a contrary intention appears, include a body corporate (*p*).

Where a statute prohibits an act, under a penalty, a corporation which by its agent (acting within the scope of his authority) does the act is liable to be convicted of the offence. Thus, a corporation may, by its servant, be guilty of selling liquor (*q*) or food (*r*), or of employing persons in a factory (*s*), or of keeping open a shop (*t*), or of allowing smoke to escape (*u*), contrary to the appropriate statutory provision (*x*).

Moreover, a corporation (which can only act by its agents) is liable to be convicted of an offence, although intention or knowledge constitute an essential element in the offence, if the intention or knowledge be in its agent acting within the scope of his authority. Thus, a corporation may be convicted of making use of a document with intent to deceive (where the intent is that of its servant), or of making a statement which it knows to be false (where the knowledge of falsity is in its servant), contrary to regulations having the force of a statute (*y*); or of giving a false account of goods conveyed by rail with intent to avoid payment of dues (where the intent is that of its servant) (*z*). The theoretical difficulty of imputing criminal intention to a corporation is not felt to the same extent as in former times (*a*).

Furthermore, the element of *mens rea*, which is essential to the offence of conspiracy, may be imputed to a corporation, acting by its servant (*b*).

(*p*) See also Criminal Justice Act, 1925 (15 & 16 Geo. 5 c. 86) s. 33, in which special provision is made as to procedure where a corporation is charged with an indictable offence or an offence in respect of which the accused may claim trial by jury. It may be noted that the Companies Act, 1929 (19 & 20 Geo. 5 c. 23), expressly imposes many penalties directly upon the company: see ss. 5, 7, 19, 23, 24, 27, 34, 40, 43—47, 51, 52, 54, 66, 67, 73, 80, 81, 91—93, 95, 96, 98, 103, 104, 110, 112, 118, 121, 129—131, 133, 144, 153, 154, 226, 238, 278, 280, 308 and 351.

(*q*) *Hotel Regina (Torquay), Ltd. v. Moon*, [1940] 2 K. B. 69; 109 L. J. K. B. 582.

(*r*) *Pearks, Gunston and Tee, Ltd. v. Ward*, [1902] 1 K. B. 1; 71 L. J. K. B. 656 (not of the nature, substance and quality demanded); and see *R. v. Ascanio Puck & Co., Ltd.* (1912), 76 J. P. 487 (sale of unsound meat).

(*s*) *R. v. Gainsford JJ.* (1913), 29 T. L. R. 359.

(*t*) *Evans & Co., Ltd. v. London County Council*, [1914] 3 K. B. 315; 83 L. J. K. B. 1284.

(*u*) *Armitage, Ltd. v. Nicholson* (1913), 108 L. T. 993.

(*z*) A corporation, however, cannot be convicted as a rogue and vagabond, nor incur a pecuniary penalty under sect. 41 of the Lotteries Act, 1823 (4 Geo. 4, c. 60), for selling tickets in a lottery (*Hawke v. Hulton & Co., Ltd.*, [1909] 2 K. B. 93; 78 L. J. K. B. 633).

(*y*) *Director of Public Prosecutions v. Kent and Sussex Contractors, Ltd.*, [1944] 1 K. B. 146; 113 L. J. K. B. 88 (Defence Regulations).

(*z*) *Moussell Brothers, Ltd. v. London and North Eastern Ry. Co.*, [1917] 2 K. B. 836; 87 L. J. K. B. 82.

(*a*) *Director of Public Prosecutions v. Kent, etc., Ltd.*, *supra*, per Hallett, J., at p. 157.

(*b*) *R. v. I. C. R. Haulage, Ltd.*, note (nn), *supra*.

INDEX.

ABANDONMENT

of agency, wrongful, measure of damages for, 112
of cause by solicitor, 63, 100, 106

ACCEPTANCE

of bill of exchange. *See* BILL OF EXCHANGE.
of offer, ratification of, 37, 39

ACCOUNT,

agent's duty to account in equity, 90, 91
right to, 165
auctioneer, by, 99
banker and client, 81, 92
bribes accepted by agent, 112, 113
commission agent, by, 94, 95
company, directors and officers of, 95, 96
complicated, investigation of, 91
directors of company, by, 95, 96
failure of agent to keep, 77
general agency, 90, 91
illegality of transaction no bar to, 91
incorrect entries in, 92
Limitations, Statute of, and right of action for, 92
mortgagee's right to, 12
preservation of, by agent, 76
principal's right to have account taken in equity, 90, 91
re-opening of, 91, 92
secret profits, of, 92
settled, re-opening of, 91, 92
ship's husband, 95
stockbroker, by, 94, 95
sub-agent, by, 72

ACCOUNTANT,

inspection of books through an, 7

ACKNOWLEDGMENT OF DEBT

by wife, when husband bound by, 28

ACT OF STATE,

ratification of act in excess of authority, 33
ratification rendering act an, 43

ADMISSIONS,

account of transactions by agent, 221
by agent, unauthorised, 219
when evidence against principal, 219
referred to for information, 219
by officer of company, 220, 221
by solicitor or counsel, 221
by wife as agent for husband, 220
report by agent to principal, 219

ADULTERATED FOOD,

sale of, by servant, liability for, 287

ADULTERATED MILK,

sale of, by servant, liability for, 287

ADULTERY

by wife, effect on implied authority, 27, 28

ADVANCES

- to agent on security of principal's property, 181
- to apparent owner of goods, lien of consignee, 183
- to factor, on pledge of principal's goods, 181
- to principal by agent, lien of agent, 135, 146
 - right of action as to, 135

AGENCY,

- assent to, 11
- constitution of, 11
- determination of. *See* DETERMINATION.
- implied assent to, 11
- of necessity, 11, 14
- relation of, constitution of, 11

AGENT. *See also* AUCTIONEER; COMMISSION AGENT; DEL CREDERE AGENT; ESTATE AGENT; HOME AGENT; MERCANTILE AGENT; PUBLIC AGENT; PURCHASE, AGENT FOR; SALE, AGENT FOR; SUB-AGENT.

- account, right to, 165
- acting for both parties to contract, 5
- acts of, how far binding on principal. *See under* PRINCIPAL.
 - ratification of. *See* RATIFICATION.
- acts which may be done by, 16
- admissions by, when evidence against principal, 219
- appointment of. *See* APPOINTMENT OF AGENT.
- assent of, in constitution of relation of agency, 11
- attachment of, 116
- auctioneer as. *See* AUCTIONEER.
- authority of. *See* AUTHORITY.
 - implied. *See* IMPLIED AUTHORITY.
- bankruptcy of, principal's right to property against trustee, 228—231
 - revocation of authority by, 274, 281
- bill of exchange, liability on. *See* BILL OF EXCHANGE.
- bills, notes and cheques drawn on, 189—191
- breach of duty. *See* BREACH OF DUTY.
- buying in own name, rights against principal in respect of, 164
- capacity to act as, 5
- charterparty effected by. *See* CHARTERPARTY.
- contract by. *See under* CONTRACT.
 - incapacity to, effect of, 5
- contractor, independent, difference between, 2 (n.)
- conversion by. *See* CONVERSION.
- co-principals, of, discharge of, 8
- credit to, exclusive, 194, 197
- criminal liability for acts of, 286—289
- death of, commission payable after, 279 (n.)
 - revocation of authority by, 279, 280
- debt due to, and money received on account of principal, 81
 - paid by, recourse to principal after, 198
- deeds executed by, principal's right to sue and be sued on, 188
- definition of, 2
- distress against, principal's property privileged from, 231, 232
- duties of, arising from fiduciary relationship, 84
 - auctioneers, 98, 99
 - breaches of, liability for. *See* BREACH OF DUTY.
 - brokers, 97, 98
 - factors, 97
 - not to use information acquired in course of agency, 90
 - shipmasters, 98
 - solicitors, 99—101
 - to account, 76, 79
 - for all secret profits, 92
 - in equity, 90, 91
 - to act according to usage, 74
 - for principal's benefit, 74
 - in good faith, 74, 87
 - to exercise due skill, care and diligence, 77, 78
 - to keep principal's property separate, 76
 - to make disclosure where any personal interest, 84
 - full disclosure where he deals with principal, 86, 87
 - to obey instructions, 74

AGENT—*continued.*

- duties of, to pay over money received to use of principal, 77, 79
 - to perform his undertaking, 74
 - to preserve correct accounts, 76
- estopped from denying principal's title, 81
- for sale. *See* SALE, AGENT FOR.
- fraud of. *See* under FRAUD.
- general. *See* GENERAL AGENT.
- gift to, 87, 89
- goods shipped in name of, lien of consignee for advances to agent, 183
- held out to be owner of goods by principal's conduct, 201
- incapacity to contract no bar to acting as, 5
- infant may act as, 5
- insanity of, revocation of authority by, 274, 279
- interpleader by, 164, 165
- judgment against, in contract, bar to proceedings against principal, 194
 - in tort, no bar to proceedings against principal, 217
- liability for own wrongs, 266, 267
 - incurred by, authority irrevocable as soon as, 276, 278
 - of, in contracts by, 235
 - may be expressly limited, 240
 - to principal, acts of sub-agents and co-agents, 116
 - attachment, 116
 - bills of exchange signed without qualification, 102
 - breaches of duty, 103
 - in accepting bribes, 112
 - in respect of contracts entered into on behalf of principal, 102
 - interest, 115
 - negligence, 103
 - payment of interest. *See* INTEREST.
 - under bills, notes and cheques, 241
- lien of. *See* under LIEN.
- married woman. *See* MARRIED WOMAN.
- misrepresentation by. *See* under MISREPRESENTATION.
- money received for principal's use, 255, 256
 - not accountable to third person, 259
 - use of third persons, 258
- necessity of, 14, 15. *See also* under MARRIED WOMAN; SHIPMASTER.
- negligence of. *See* NEGLIGENCE.
- notice to, when equivalent to notice to principal, 222
- ownership, apparent, effect of, 175
- payment by third person to. *See* PAYMENT.
- person having no capacity to contract on own behalf as, 5
- personal interest of, must be disclosed, 84
- powers of, limit to, 46
- principal. *See* PRINCIPAL.
- promissory note, liability on, 241—243
- purchasing in own name for principal, 86
- ratification of acts of. *See* RATIFICATION.
- relationship of, and principal, constitution of, 11
- remuneration of. *See* REMUNERATION.
- renunciation of contract of agency by, 282
- report to principal by, 219, 221
- representations by, disclaimer by principal, 211
 - when evidence against principal, 219
- right to sue for money paid by mistake, 266
 - in own name on contracts, 261
 - authority irrevocable where agent has, 276, 278
 - intervention of principal, 264
 - limitation of, 262
 - rights of defendant, 265
- rights of, against principal in respect of goods bought in own name, 164
 - lien. *See* under LIEN.
 - none, to sue principal on contracts entered into on his behalf, 166
 - of interpleader, 164, 165

AGENT—*continued.*

- rights of, against principal, remuneration. *See under* REMUNERATION.
- stoppage in transitu, 163, 164
- to an account, 165
- sale for. *See* SALE, AGENT FOR.
- sale of own property to principal may terminate agency, 87
- set-off. *See* SET-OFF.
- signature on bill or note, effect of, 241
- solicitor as. *See* SOLICITOR.
- special, definition of, 2
- sub-agent. *See* SUB-AGENT.
- suing in own name on contracts. *See under* "right to sue" above.
- title deeds entrusted to, liability of principal, 176
- torts of. *See* WRONGS OF AGENT.
- two principals, which is liable, 212
- unable to read, 5
- unauthorised act of, dealings with money and negotiable securities, 177
- how far binding on principal, 167, 172
- wife as. *See* MARRIED WOMAN.
- wrongs of. *See* WRONGS OF AGENT.

AGREEMENTS

- by agents. *See* CONTRACT.

ALIEN ENEMY,

- effect of war on agency of, 275

AMBIGUITY

- in authority given to agent, 48

APPOINTMENT,

- power of, may not be delegated, 6

APPOINTMENT OF AGENT

- by corporations, 31
- by deed, 30
- by word of mouth, 30, 31, 32
- by writing, 30
- entry in minute book of company, 30 (n.)
- in general, 30
- to execute a deed, 31
- to purchase land, 30
- under seal, 30, 31, 32

ARCHITECT,

- authority of, 57
- duty to hand over plans, 77 (n.)

ARREST,

- implied authority to, 55
- wrongful, liability for, 211, 216
- solicitor's, 269

ASSAULT

- by agent, liability for, 216
- ratification of act of, liability for, 34, 43

ASSENT,

- to constitution of relation of agency, 11—14

ASSOCIATION,

- unincorporated, all members liable for agent's acts, 19

ATTACHMENT

- of agent, liability as to, 116

ATTORNEY, POWER OF. *See under* POWER OF ATTORNEY.

AUCTION,

- purchase of separate lots, at, indivisible agreement for, 51

AUCTIONEER,

- account by, 99
- act in person, duty to, 98
- agent for buyer and seller, 5
- agent for sale, 62
- attachment of, 116 (n.)
- authority of, determination of, 274
 - revocation of, 277, 283
- bill of exchange taken in payment by, 47, 105
- cheque, acceptance of, 75
- clerk of, authority of, 13
- contract with purchaser, nature of, 238
- conversion by, innocent, 270, 272
- Court, sale by order of, 99
- definition of, 3
- delivery of goods sold, 99
- deposit paid to, liability as to, 257, 258
 - vendor's liability for, 187
- deputy or sub-agent, no implied authority to employ, 70
- diligence to be used by, 98
- disclosure of principal by, 98
- distress against, principal's property privileged from, 231, 232
- duties of, 98, 99
 - to accept highest *bona fide* bid, 75, 99, 239
 - to sell for ready money, 75, 98
- goods entrusted to, not pledged within Factors Act, 179 (n.)
- implied agency, extent of, 13
 - authority of, 62
 - to sign contract for highest bidder, 13
 - warranty of authority, 251
- indemnity, right to, 136, 142
- interpleader by, 165
- liability of, 238
 - for negligence, 105, 106
 - under contract of sale, 238, 239
- licence taken out by, 98 (n.)
- lien of, 147
- mistake by, in selling without reserve, 169
- money paid to, liability as to, 257
- negligence of, effect on remuneration, 134
 - liability for, 105, 106
- offer of highest *bona fide* bidder, acceptance of, 75, 99, 239
- payment to, 62, 204
- private contract, no implied authority to sell by, 62
 - sale by, where auction agreed, 133
- proceeds of sale retained by banker, 178
- purchase of property for auction by, 85
- purchaser by private contract, signing of contract for, 13
- ready money, duty to sell for, 75, 98
- remuneration of, implied contract as to, 119
- right to sue in own name on contract, 261, 262
 - effect of settlement with principal, 265
- sale by, without authority, 251
 - no implied authority to rescind, 62
 - of own property by, 85
- stakeholder, 98
- unlawful transaction, losses and liabilities incurred in, 142
- warranty, no implied authority to give, 62

AUTHORITY,

- acts within, not amounting to conversion, 270
- ambiguous terms, 48
- cannot exceed powers of principal, 46
- conduct representing warranty of, 249
- construction of, 46, 48
- deed, given by, 46
- delegation of, by agent, when permitted, 69; *and see* DELEGATION.
- determination of. *See* DETERMINATION OF AGENCY; REVOCATION.
- disputed, 249 (n.)
- express, nature and extent of, 46

AUTHORITY—continued.

- Factors Act, effect of, 179—183
- general terms, construction of, 46
- implied. *See* IMPLIED AUTHORITY.
- implied warranty of, 249
 - damages for breach of, 253
- inferred, 46
- interest, coupled with, irrevocable, 276—278
- irrevocability of, 275
- limited to powers of principal, 46
- mercantile agent and, 179
- not under seal, construction of, 51
- power of attorney, given by, 46
- ratification of act done without. *See* RATIFICATION.
- revocation of. *See* under REVOCATION.
- scope of, acts of agent beyond, not binding on principal, 172
 - within, how far binding on principal, 167
- to pay third person, 258, 259
- verbal instructions as to, 46
- warranty of, breach of, costs of action against principal, 254
 - liability for, 249
 - loss must be natural and probable consequence of, 254
 - measure of damages for, 253
 - part performance, no remedy on ground of, 255
- implied, 249
 - breach of, damages for, 253
 - principle not applicable to public agent, 249 (n.)
- writing, may be given in, 46
- wrongs of agent acting within scope of, liability for, 206

BAD DEBTS

- remuneration in respect of, 119

BAILIFF,

- acts of, liability for, 207, 268
- implied authority of, 53, 54, 56

BANK MANAGER,

- misappropriation by, liability for, 213
- unauthorised act of, 174

BANKER,

- account by, 81, 92
- advance made on unauthorised pledge by agent, 180
- bankruptcy of, principal's right to bills on, 229
- collecting cheque, liability as to, 270, 271
- conversion by, innocent, 271
- dishonour of bill by, wrongful, 111, 112
 - of cheque by, wrongful, 111
- indorsing bill, no right to sue, 263
- liability of, for acts of agent, 117
 - for negligence, 105, 107
- lien of, 149, 150, 158, 159
 - general, by implication from custom, 147
- negligence of, 105, 107, 167, 168
- payment of altered cheque by, 145
- set off of one account against another, 178

BANKING ACCOUNT,

- authority to overdraw, 250

BANKRUPT,

- sale or purchase on behalf of, ratification of, 41, 44

BANKRUPTCY,

- composition, signature to proposal of, 7, 8
- determination of agency by, 274, 280, 281

BANKRUPTCY—continued.

- of agent, after misappropriation of money, 228
 - determination of agency on, 274, 281
 - effect on payments already made, 205
 - right of set-off by third person, 203
 - losses and liabilities due to, no indemnity against, 141, 145
 - possession of books on, right to, 76 (n.)
 - principal's right to property as against trustee, 228—231
 - property seized by principal on, 231
 - revocation of authority by, 274, 281
- of banker, 229
- of broker, 72, 145, 228, 231
- of principal, contract by agent after, valid against trustee, 282
 - determination of agency on, 274
 - effect on authority of agent to pay third person, 259
 - irrevocable authority not determined by, 276
 - liability of agent after, 281
 - lien of agent on goods, 147, 148, 150
 - revocation of authority by, 280
 - acts done before receiving order, 281, 282
 - except as to formal acts, 280, 282
 - right to possession of books on, 76 (n.)
- petition, malicious presentation of, by agent, 267, 268
- trustees in, ratification of sale or purchase on behalf of bankrupt, 41, 44

BARRISTER,

- admissions by, 221
- breach of duty, no liability for, 103
- fee not recoverable, 118
- implied authority of, 62, 63
 - to compromise or abandon claim, 62
 - to consent to non-suit or withdrawal of juror, 62
 - order, 63
 - to enter into agreement with other side, 62
- memorandum, signature to, 63
- negligence of, no liability for, 103
- purchase of charges on client's property by, 93
- remuneration not recoverable, 118

BETS,

- authority to make, when irrevocable, 278
- bookmaker failing to lay, 107
- payment of, not recoverable, 143
 - of winnings, 81

BETTING TRANSACTION,

- implied authority of commission agent as to, 56
- no remuneration in respect of, 130, 131

BILL BROKER,

- authority implied by custom to sell on, 58
- indemnity against losses and liabilities, 137

BILL OF EXCHANGE,

- acceptance of, etc., under power of attorney, 50
- acceptor's liability, 190
 - on, when indorsed without authority, 257
- agent to obtain payment, authority of, 52
- agent's liability as acceptor, 241
 - drawer, 242
 - indorser, 242
- auctioneer, accepted by, 105
- authority to bind principal by, 50
- banker indorsing, no right to sue, 263
- broker signing, 103
- company's liability as acceptor, 190
- directors of company, accepted by, 251
- drawn by agent, principal's liability on, 168
 - on agent, 190, 241.

BILL OF EXCHANGE—continued.

- drawn on principal, 190, 241
- liability of agent on, 241, 242
- partner drawing, liability for, 17,
- payment by third person to agent by, 204, 205
- person liable on, 189, 190
- principal's liability on, 189
- ratification of agent's act in suing on, 34
- received in payment, agent having no authority, 47
- signature on, effect of, 189, 241
 - per procuration*, 183
 - without qualification, liability on, 103

BILL OF LADING,

- agent's liability in respect of, 237
- pledge of, by company, 182
- shipmaster's authority to sign, 68
 - liability under, 239
 - right to sue, 263
- signed by shipmaster, 17
 - binding on principal, 170

BILL OF SALE

- may be executed by an attorney, 6

BOOKMAKER. See TURF COMMISSION AGENT.

BOOKS,

- production of, by agent, 76

BORROWING POWERS,

- liability for exercise of, by directors, 170, 171
- See also* ADVANCES; LOAN.

BOTTOMRY,

- implied authority as to, 66
- shipmaster's lien and bond, 156

BREACH OF DUTY,

- bribery of agent causing, 112
- broker, by, 104
- counsel not liable for, 103
- damages for, measure of, 109
- estate agents, 112
- factor, by, liability for, 181
- liability of agent to principal for, 103, 104
 - disobedience to instructions, 104
 - exceptions to, 103
 - Statute of Limitations, running of, 103 (n.)
- insurance broker, 106
- losses and liabilities due to agent's own, no indemnity against, 141, 145
- nominal damages for, 107
- solicitor, by, 105, 106, 109
- sub-agent, by, 117
- wilful, effect on remuneration, 132

BREACH OF TRUST,

- agent's liability for, 272

BRIBERY,

- account of bribes, 112, 113
- contract made under influence of, voidable, 232
- criminal liability for, 114
- interest payable on bribes, 112, 116
- no right of action by agent for promised bribes, 266
- of agent, account to principal, 112
 - criminal liability for, 114
 - dismissal for, 113
 - for purchase, 114
 - forfeiture of remuneration for, 112

BRIBERY—continued.

- of agent, interest payable on bribes, 112, 116
 - liability to principal, 112
 - rights of principal against agent and briber, 232, 233
 - Statute of Limitations in action against agent, 112
- of director, 113
- of public servant, 114 (n.)
- of servant of company, 113
 - the Crown, 113
- Prevention of Corruption Act, 114

BROKER. See also INSURANCE BROKER; SHIP BROKER; STOCKBROKER.

- agent for buyer and seller, 5
- apparent ownership of principal's property, 176
- authority of, revocation of, 283
- bankruptcy of, effect of, 72, 145
 - principal's right to follow property, 228, 231
- bill of exchange signed by, 103
- bills drawn in own name, liability of principal for, 170
- bought and sold notes, 191
- breach of duty by, 104
- buying for several principals, 59
 - in own name, 59
- contract by, cancellation of, no implied authority as to, 61
 - duties as to, 97
 - verbal, 247
 - note in own name, liability in respect of, 237
- credit, no implied authority to sell on, 46, 61
- custom, authority to act in accordance with, 58, 59, 60
- default of, losses due to, 145
- definition of, 3
- delegation by, no implied authority as to, 61, 70
- delivery of goods by, 98
- deputy or sub-agent, authority to employ, 70
- determination of authority of, 274
- duties of, 97, 98
- estimation of value of goods for sale, 75, 98
- examination of goods purchased, 98
- held out to be principal, payment to, 203
- illegal transaction by, effect on remuneration, 131
- implied authority of, 61
 - to close account, 61
 - to receive payment for undisclosed principal, 61
 - to sell on credit, 58
 - reasonable credit where no usage to contrary, 61
 - to sign memorandum, 61
- warranty of authority, 251
- inspection of goods purchased, 78
- insurance. *See* INSURANCE BROKER.
- knowledge of, when notice to principal, 223
- liability of, incurred under usage of particular market, 138, 139
 - personal, 237, 238, 247
- lien of, as sub-agent, 161
- losses, indemnity against, 139
 - no implied authority to pay, 61
 - on behalf of underwriter, 61
- memorandum of contract by, 61, 191
- money paid to, under mistake of fact, 257
- note of contract sent to other party, 191
- own name, no implied authority to contract in, 61
 - property, sale or purchase of, 98
- payment to, 198, 199, 204
 - London agent of, 204
- payments, receipt of, 61
- personal interest in sale, disclosure of, 84, 85
- pledge by, fraudulent, how far affecting principal, 176, 177
 - no implied authority to, 61
 - of bills, 61
 - unauthorised, 180
 - unauthorised, 184

BROKER—continued.

- prevented from earning remuneration, 129
- reselling on death, bankruptcy, etc., of principal, indemnity against loss, 139—141
- right to indemnity against losses and liabilities, 138
 - sue in own name, 262, 263, 265
 - defence to action, 265, 266
- sale of goods to self, 84
- secret profit by, 93
- selling at lower price than authorised, liability for, 104, 105
 - in own name, 238
- set-off against, by third person, 203
- ship. *See* SHIP BROKER.
- stockbroker. *See* STOCKBROKER.
- skill, exercise of, 98
- taking over shares, 86
 - stock in absence of purchaser, 60
- unauthorised act, losses and liabilities incurred through, 144, 145
- unlawful transaction, liabilities incurred in, 142
- usage of trade, authority to act in accordance with, 58—60

BUILDING SOCIETY,

- deeds of, as security, 157, 157 (n.)
- dissolution of, authority to subscribe to instrument of, may be verbal, 30
- signature to instrument of, 8

BUSINESS,

- usage of, implied authority from, 46
 - to act in accordance with, 58—60

CAR. *See* MOTOR CAR.

CARE,

- degree of, 78
- exercise of, agent's duty as to, 78

CARGO. *See under* SHIPMASTER.

CARRIER,

- agency of, 83

CHARACTER

- of third persons, misrepresentations by agent as to, 218

CHARTERPARTY

- effected by agent as owner of ship, 187
- executed by shipmaster in own name, 189
- implied authority of shipmaster to enter into, 65
- liability under, 245, 246
- shipbroker signing, authority of, 252
- shipmaster chartering in own name, no right to sue, 264
- termination of, by sale to charterers, 128, 129

CHEQUE,

- acceptance by auctioneer, 75
- agent's liability on, 241
- banker's liability on collecting, 270, 271
- crossed, collection of, by banker, 271
- dishonour of, wrongful, 111
- liability as to, 189
- payment by, 47 (n.)
- power of attorney, drawn under, 49
- signature on, effect of, 189
 - "per procuration," 183

CHILDREN,

- necessaries supplied for, 24, 25
- no implied authority to pledge parent's credit, 29

CLERK,

- acts of, liability for, 208, 211, 212
- authority of agent exercised through, 70
- holding out to be agent, 17, 18
- notice to, of company, 224
 - of solicitor, 224
- of company secretary, fraud by, 117
- of mercantile agent, agreement made with, 180 (n.)
- tender to, operates as tender to solicitor, 169

CLUB,

- committee may not pledge credit of members, 16
- goods ordered by member of committee, 18
 - supplied to, liability for, 18, 237
 - payment for, 249
- liability of committee for acts of servant, 16

CO-AGENTS,

- appointment of, 8.
- authority given severally, 9
- concurrence in execution of joint authority, 8
- joint and several authorities to, 9
- liability for acts of, 116
- majority of, acts of, 9
- wrongs of, agent not liable for, 273

CO-PRINCIPALS,

- agent appointed by, 8
 - discharge of, 8

COACHMAN,

- horses hired out to, 17
- implied authority of, 54
- knowledge of ferocity of dog, as knowledge of master, 223

COLLISION

- at sea, liability for, 208, 208 (n.)

COMMISSION. See REMUNERATION.**COMMISSION AGENT,**

- account by, 94, 95
- pledge of foreign principal's credit by, 57
- turf. *See* TURF COMMISSION AGENT.

COMMITTEE,

- delegation of powers to, 70
- of club, liability for acts of servant, 16

COMPANY,

- account to, by directors and officers, 95, 96
- act *ultra vires*, not capable of ratification, 34
- appointment of agent by parol, 30, 31, 32
- benefits retained by directors, 95
- bill of exchange accepted by directors, 190
- books and documents of, no lien against, 157
- bound by act of directors, 18
 - person held out to be agent, 18
- chairman, statement by, liability for, 221
- contract made before incorporation, 248, 248 (n.)
 - on behalf of, liability in respect of, 236 (n.)
- directors of. *See under* DIRECTOR.
- dissolution of, determination of agency on, 274
 - revocation of authority by, 279
- dividends paid out of capital, 105
- future, contracts on behalf of, 248, 249
- goods ordered for, liability for payment of, 169
- incorporated, agent cannot exceed powers of, 46
- in formation, officer of, 16

COMPANY—continued.

- manager of, implied authority, 55
 - liability for acts of, 171
- managing director obtaining payment of private debt, 172
- meeting of, ratification of notice of, 44
- memorandum of association, agent may subscribe name, 8
- misrepresentations as to credit of third persons, 218 (n.)
- notice to clerk, 224
 - to director or officer, 225
- offer made to, ratification after withdrawal of, 39
- persons dealing with, deemed to have notice of contents of memorandum, etc., 170
- pledge of bills by, 182
- promoters of, agency of, 14
 - authority of, 16
 - contracts by, 248, 249
 - ratification of acts of, 35
- purchase of goods for, ratification of. *See* RATIFICATION.
- purchasing own shares, 224
- railway. *See* RAILWAY COMPANY.
- ratification by. *See* RATIFICATION.
- registered regulations of, notice of, 183
- sale to, by director of, 84, 85
- secretary of, authority of, extent of, 175
 - bribery of, 113
 - clerk of, fraud committed by, 117
 - fraudulent act of, liability for, 172, 174, 175
 - fraudulently using seal, 177
 - knowledge of, when not imputed to company, 225
 - representation by, liability for, 221
 - signing promissory note, 243
- servants of, admissions and statements by, liability for, 220, 221
- shareholders, ratification by, 41
- shares, application for, authority for, 18
- ultra vires* acts. *See* ULTRA VIRES.
- winding-up, agent prevented from earning remuneration by, 129, 130
 - effect on transferred shares, 192, 193
 - petition, affidavit of attorney, 8 (n.)
- wrongs of agents, liability for, 214, 215

COMPLETION OF TRANSACTION.

- determination of agency on, 274

COMPROMISE

- by solicitor, after judgment not binding, 63 (n.)
 - against instructions, 104
 - before action begun, no implied authority, 64
 - when binding, 169

COMPULSORY PURCHASE

- effect on agency to find purchaser, 121

CONDUCT,

- implied warranty of authority from, 249

CONSENT,

- agent instructed to give, 168
- not implied by mere silence or acquiescence, 11
- to addition of party under Ord. 16, r. 11...8

CONSIGNEE,

- lien of, for advances to apparent owner of goods, 183

CONTRACT

- between agent and principal, duty of full disclosure, 86
 - want of disclosure or good faith, 87
- breach of, ratification of acts done, 44
- by agent, action by principal on, defence to, 199
 - after act of bankruptcy by principal, 282
 - authority to enter into, on behalf of principal, 6
 - credit given to agent, effect on right to sue principal, 194

CONTRACT—continued.

- by agent, customs and usages, effect of, 191—194
 - description of agent in, 243, 244
 - determination of personal liability, 235, 247
 - effect of fraud, misrepresentation or knowledge on, 199
 - judgment against principal, 248
 - foreign principal and right to sue or be sued on, 188
 - in own name, 237, 243
 - in particular market, subject to customs and usages of, 191
 - intention, admissibility of parol evidence of, 246
 - judgment against agent, effect on right to sue principal, 194
 - principal, effect of, 248
 - liability on, 102
 - determination of, 243
 - if contracting as agent, 235, 239
 - personally, 235
 - may be expressly limited, 240
 - on behalf of principal, liability for, 102
 - no right of action against principal, 166
 - partly performed, right of principal to sue and be sued, 186
 - payment to agent under, when binding on principal, 201, 202
 - principal's right to sue and be sued on deeds, 188
 - or be sued in own name on, 185, 186
 - repudiation of, by principal, 253
 - right of agent to sue in own name on, 261
 - intervention of principal, 264
 - rights of defendant, 265
 - settlement with principal, 264
 - settlement between principal and agent affecting recourse to principal, 197, 198
 - signature on, 243
 - under influence of bribery, 232
 - seal, liability on, 240
 - verbal, 237
 - liability on, 247
- by company promoters, 248, 249
- by government department, 235
- by infant, ratification on majority, 36
- by principal professing to be agent, 248
- by public agent on behalf of Crown or Government, 234
- by solicitor, liability in respect of, 236, 237, 239, 244, 245
- capacity to enter into, 4
- clerk or factor of one party, agency of, 5
- entered into on behalf of principal, agent may not sue principal, 166
- fraudulent or voidable, ratification of, 42
- intention, parol evidence of, admissibility of, 246
- principal fictitious or non-existent, 248
- ratification of. *See* RATIFICATION.
- sale subject to, 127
- signed without qualification, 243—246
- verbal, 237, 247

CONTRACT OF AGENCY,

- determination of. *See also* DETERMINATION; REVOCATION
- specific performance of, 19

CONTRACT OF SALE

- by agent, right of principal to sue and be sued on, 185

CONTRACTOR,

- distinguished from agent, 2 (n.)

CONTRIBUTION,

- between joint tortfeasors, 218

CONVERSION,

- acts not amounting to, 270
- by agent, acts in good faith, liability for, 270
 - not amounting to, 270

CONVERSION—*continued*.

- by agent, except in cases within Factors Act, 270
 what amounts to, 269, 270
- by auctioneer, innocent, 270, 272
- by banker, innocent, 271
- by insurance broker, innocent, 271
- goods obtained by fraud, 270, 271
- ratification of act amounting to, 34, 40, 43

COPYRIGHT,

- infringement of, by agent, 206, 207, 268

CORPORATION,

- agent, appointment of, 4, 31
 cannot exceed powers of, 46
- criminal offence by, 288
- dissolution of, revocation of authority by, 274, 279
- foreign. *See* FOREIGN CORPORATION.
- holding out by, effect of, 32
- municipal. *See* MUNICIPAL CORPORATION.
- wrongs of agents, liability for, 214, 215
 See also COMPANY.

CORRUPTION. *See* BRIBERY.

COUNSEL. *See* BARRISTER.

CREDIT,

- broker, no implied authority to sell on, 46, 61
- exclusive, given to agent, effect of, 195, 197
 to principal, and liability in respect of agent's contract, 236
- implied authority to pledge, of child, 29
 of groom or coachman, 54
 of hospital matron, 54
 of manager, 53
 of shipmaster, 53, 66
 of stationmaster, 54
 of woman cohabiting with man as wife, 29
 of wife. *See* MARRIED WOMAN.
- of husband, pledged by wife. *See* MARRIED WOMAN.
- of third persons, misrepresentations by agent as to, 218
- representations as to, 7
- sale on, implied authority as to, 46, 58, 61
- stockbroker has no authority to sell on, 46, 61
- unauthorised sale on, 173

CRIMINAL LIABILITY

- of principal for acts of agent, 286—289

CROWN

- may sue or be sued on contract by public agent, 185
- public agent contracting for, no personal liability, 234
 statutory liability, 235
- ratification by, 43, 45
 of act of public agent in excess of authority, 33
- servant of, and liability for wrongs of subordinates, 205 (n.)
 bribery of, 113, 114 (n.)
- wrongs of agent, not liable for, 205

CUSTOM,

- capacity to act existing by, 4
- contract by agent in particular market subject to, 191, 192
 for payment of remuneration implied from, 118
- effect of, 191—194
- general lien by implication from, 147
- implied authority from, 46
 to act in accordance with, 58—60

CUSTOM—continued.

- inconsistent with duty to make disclosure of personal interest, 86
- payment of remuneration, 120
- liability of agent on contract, determined by, 236
 - evidence to show, 246
- market, of, liabilities incurred by, 138, 191, 192
- payment in form other than money, 46
- principal bound by, of particular markets, 191, 192
- remuneration, amount ascertained by, 118
 - on performance of undertaking, payment of, 124, 126
- set-off, payment by way of, 202
- stock exchange, of. *See* STOCK EXCHANGE.

DAMAGE

- suffered by principal, liability of agent, 103
 - must be legal damage, 107

DAMAGES,

- agent wrongfully prevented from earning remuneration, 127
- measure of, for abandonment of agency, wrongful, 112
 - for breach of duty by agent, 109
 - for breach of warranty of authority, 253
 - for delivering goods without payment, 111
 - for failing to insure, 110
 - for improper sale of stocks, 111
 - for negligence of agent, 109
 - for purchasing inferior goods, 110
 - for stockbroker wrongfully closing account, 111
 - for wrongful allotment of shares, 111
 - where agent is wrongfully prevented from earning remuneration, 127

DEATH,

- of partner, effect on agency, 279, 280
- of principal, effect on right to remuneration, 132
 - irrevocable authority not determined by, 276
- revocation of authority by, 274, 279, 280

DEBENTURES,

- holders of, receiver appointed by, 12

DEBT,

- agent authorised to pay, 258, 259
- demand for, ratification of, 38
- due to agent from principal, set-off and, 138
 - to principal, purchased by agent, 93
- of agent, set-off by third persons for, 201, 202
- payment of, ratification of, 39, 42
- security for, loss of ship held as, 80
- settlement between principal and agent affecting recourse to principal for, 197, 198

DEBTOR,

- business assigned to trustees, 12
- inspectors appointed by, 12

DEED,

- agent may execute, 6
- agent's liability when party to, 240
- appointment of agent by, 30
- authority to execute, 31
- executed by agent, principal's right to sue and be sued on, 188
 - in agent's name, principal's rights and liabilities on, 188

DEED OF ARRANGEMENT,

- agent may execute, 6

DEFAULT,

- losses and liabilities due to agent's own, no indemnity against, 141, 145, 146

DEL CREDERE AGENT,

- advances by, to principal, 135
- contract by, right of principal to sue and be sued on, 186
- definition of, 3
- difference between purchaser and, 3
- liability in respect of contract entered into on behalf of principal, 102
- obligation of, 3
- right to sue in own name, 262, 264

DEL CREDERE COMMISSION, 48

- agreement for, 3
- delegation under, 60
- sub-agency and, 72
- when due and payable, 124 (n.)

DELEGATION,

- authority, express or implied, necessary for, 69, 74
- broker, no implied authority as to, 61
- by agent, emergency, in, 69
 - implied authority of principal, 69
 - intention presumed from conduct, 69
 - ministerial acts, 69
 - nature of authority necessitating, 69
 - when permitted, 69
- factors, no implied authority of, 60
- liens of sub-agents, 159, 160

DELEGATES NON POTEST DELEGARE, 69

DEPOSIT

- paid by agent, principal's right to sue for return of, 187
- to auctioneer, vendor's liability for, 187

DEPUTY. See SUB-AGENT.

DETERMINATION OF AGENCY

- by bankruptcy, 274, 280, 281
- by death or lunacy, 274, 279, 280
- by notice of revocation, 282
- by renunciation, 282
- by sale to principal of agent's property, 87
- events causing, 274
- notice to third persons of, 284
- right to books, etc., on, 77 (n.)
- See also* REVOCATION.

DILIGENCE,

- degree of, necessary, 78
- exercise of, agent's duty as to, 77, 78

DIRECTOR,

- act of, in obtaining payment of private debt, company not liable for, 172
- acting outside scope of authority, 185
- benefits retained by, 95
- bill of exchange accepted by, 190, 251
- borrowing for company, liability as to, 170, 171
- bribery of, 113
- company bound by acts of, 18
 - ratification by, 41
- consent to acts, 9
- contract *ultra vires* of, not capable of ratification, 34
- contracting with own company, 88
- declaration of interest in contracts, 82, 86, 88
- delegating powers to manager, liability as to, 171
- delegation of power to purchase shares by, 70
- deputy or sub-agent, no implied authority to employ, 70
- duty to disclose personal interest in contract with company, 82, 86, 88
- implied authority, 55
 - measure of damages for breach of, 253
 - to employ deputies, 70

DIRECTOR—continued.

- implied warranty of authority, 250, 251
 - to borrow money, 250, 252
 - liability for mistakes or errors of judgment, 106
 - for negligence, 105, 106
 - on bills of exchange, 242
 - on contract under seal, 240
 - on promissory note, 173, 242, 243
 - managing, obtaining payment of private debt, 172
 - misrepresentation by, in prospectus or notice, 273 (n.)
 - negligence of, liability for, 268
 - wrongful allotment of shares by, 111
- See also* COMPANY.

DISCHARGE

- of agent of co-principals, 8
- See also* DETERMINATION OF AGENCY; REVOCATION.

DISCLOSURE

- by agent, duty as to, 86, 87
- in dealing with principal, 86, 87
- of personal interest by agent, 84
 - director, 84, 86

DISCOUNTS

- paid to agent, effect on remuneration, 133

DISCRETION,

- act involving, to be exercised by agent personally, 69, 71

DISCRETIONARY POWER,

- agent cannot exercise, 7

DISEASE

- contracted at nursing home, liability of officers for, 215

DISMISSAL

- of agent for bribery, 113

DISTRESS,

- privilege from, of goods intrusted to agent, 231, 232
- ratification of, 38, 40, 42, 43
 - liability of agent after, 269
- solicitor's liability for, 269
- wrongful, liability for, 207, 208, 215, 268
 - repayment of money received by, 256
 - solicitor's liability for, 269

DIVORCE PROCEEDINGS,

- costs of, credit for, after wife's adultery, 27

DOCK,

- damage resulting from use of, liability for, 208

DOCTOR

- liability of hospital authorities for act of, 215

DOCUMENTS,

- production of, by agent, 76

DOCUMENTS OF TITLE,

- agent having, deemed to be owner by principal's conduct, 201
 - dispositions by, 179
- meaning of, 179 (n.)
- transfer of, modes of, 180 (n.)

DOG,

- dangerous, knowledge as to, 223

DRIVER

of vehicle, injury caused by, liability for, 207, 209, 210

DURESS,

money obtained by, repayment by agent of, 255, 256

DUTIES OF AGENT. *See under AGENT.*

EMERGENCY,

powers given for cases of, 189

ENEMY ALIEN,

solicitor acting for, 375

ESTATE AGENT,

agreement to share commission, 128 (n.)

breach of duty by, 112

company acting for both vendor and purchaser, 134

contract by, for sale, 57

acceptance by principal, 173

liability for, 247, 248

duty to submit offers to principal, 75

prevented from earning remuneration, 127, 128

remuneration of, 121, 122, 123, 125, 134

"sole agent" and sale effected by owner, remuneration, 130

solvency of tenants, care required, 78

valuation by, skill required, 79

ESTOPPEL,

agency by, 18

of agent from denying principal's title, 81, 82

of company and fraud of secretary, 172, 173

by representation of agent, 170

set-off by third person of agent's debt, against principal, founded on, 203

EVIDENCE

of intention as to liability on contract, 246, 248

EX TURPI CAUSA NON ORITUR ACTIO,

application to agency, 91

EXECUTION. *See DISTRESS.*

EXECUTOR,

agent of, dealing with trust fund, liability of, 273

liability to legatee, 260

de son tort, agent of, assets collected by, 268

liability to account for assets collected, 256

power of attorney granted by, 50

ratification by, 44

of acts done on behalf of principal, 38

EXPENSES OF AGENT. *See INDEMNITY.*

FACTOR,

accounts, duty as to, 97

act in person, duty to, 97

authority of, when irrevocable, 277, 278

barter or pledge of goods or the bills, no implied authority to, 60

breach of duty, liability for, 181

credit, implied authority to sell on, 60

definition of, 2

delegation by, no implied authority for, 60

deputy or sub-agent, no implied authority to employ, 70

dispositions by. *See FACTORS ACT.*

distress against, principal's property privileged from, 231, 232

FACTOR—continued.

- duties of, 97
- fraudulent sale by, liability of principal, 181
- implied authority of, 60
- insurance by, 97
- lien, of. *See* LIEN.
- pledge by, unauthorised, 181
 - wrongful, 81
- purchase of principal's goods by, 97
- ratification of purchase price paid by, 44
- right to sue in own name on contract, 261, 264
- sale by, implied authority as to, 60
 - principal may sue for price, 186
- set-off against, by third person, 202
- sub-agent employed by, 72
- warranty, implied authority to give, 60

See also FACTORS ACT; MERCANTILE AGENT.

FACTORS ACT, 1889,

- dispositions in ordinary course of business, 179, 182
 - protected by, 179
 - to two or more persons, want of faith on part of any, 180
- documents of title, meaning of, for purposes of Act, 179 (n.)
- lien of consignee for advances to apparent owner of goods, 183
- ordinary course of business, 179, 182
- persons taking in good faith and without notice, 179, 180
- pledge for antecedent debt or liability, 179
 - in consideration of other goods or securities, 179
 - meaning of, for purposes of Act, 179 (n.)
 - of documents of title, 179
 - deemed pledge of goods, 180
 - of goods without authority, 179
- possession by consent of owner, 182
 - consent of owner presumed, 179
 - meaning of, for purposes of Act, 179 (n.)
 - obtained by fraud, 182
 - through larceny by a trick, 182

See also FACTOR; MERCANTILE AGENT.

FALSE IMPRISONMENT,

- liability for, 211
 - solicitor's, 269

FARM BAILIFF,

- implied authority of, 54

FICTITIOUS PRINCIPAL,

- contract on behalf of, 248

FIDUCIARY RELATIONSHIP

- account, duty of agent to, 90, 91
- duties arising from, 84
- transactions by agent in violation of duties arising from, no remuneration in respect of, 132

See also AGENT, duties of; DISCLOSURE.

FIRE,

- damage by, liability for, 210

FIRM,

- change in, 15 (n.)
- partners of. *See* PARTNER.
- person representing himself to be partner of, 15

See also PARTNERSHIP.

FOLLOWING PROPERTY,

- right of principal as to, as against agent's trustee in bankruptcy, 228
 - into hands of third persons, 227
 - privilege from distress of goods in hands of agent, 231

FOOD, ADULTERATED,
sale of, by servant, liability for, 287

FOOD AND DRUGS ACT,
sample procured by agent of officer, 7

FOREIGN CORPORATION,
agent of, acceptance of service of writ by, 6

FOREIGN LAW,
sale or hypothecation by shipmaster determined by, 64

FOREIGN PRINCIPAL,
contract on behalf of, agent's liability on, 244
liability in respect of, 236
credit pledged by commission agent, 57
definition of, 1
right to sue and be sued on contract by home agent, 188
unauthorised act of agent, rights as to, 181

FOREIGN STATE,
agent of, not liable to third persons for money due, 260
injury to member of, outside realm, liability for, 267

FORGERY
of signature, not capable of ratification, 34

FRAUD,
company, liability for, 172, 173, 174, 175, 214, 215
conversion of goods obtained by fraud, 271
fraudulent misrepresentation by agent, liability for, 211
representation of authority, 249
liability for agent's, 211, 215
of persons concerned in, 267
money obtained by, for use of principal, agent's liability to repay, 255
paid through, agent's right to sue for recovery of, 266
recovery of, 257, 258
of agent as defence to action by principal, 190
how far acts binding on principal, 167, 170, 171
principal's right to follow property after, 227
refund of purchase-money on rescinded sale, 81
of principal, agent's contract voidable on grounds of, 200
possession obtained by, and operation of Factors Act, 181
settled accounts, re-opening in cases of, 91
solicitor by, liability for, 171
sub-agent, of, liability for, 117
upon principal, agent party to, knowledge not imputed to principal, 223, 224

FRAUDULENT PREFERENCE
by agent, 212

FREIGHT,
sale or hypothecation by shipmaster, 64, 65, 66, 67

GAMING,
criminal liability in permitting, 286
no indemnity against losses and liabilities, 141, 143
no remuneration in respect of transaction, 131, 132
payment of winnings, 81

GENERAL AGENT,
account by, 90, 91
definition of, 2
implied authority of, 53
See also AGENT.

GIFT

- by client to counsel or solicitor, 89, 90
- by principal to agent, 87
 - validity of, 87, 90
- by will to agent, 90

GOOD FAITH,

- duty of agent to act in, with principal, 86, 87
- of agent, burden of proof of, 87
- person dealing with agent in, liability of principal to, 167
 - taking under disposition by factor, 179, 180

GOVERNMENT,

- not agent for subjects, 6

GOVERNMENT DEPARTMENT,

- compulsory purchase by, effect on agency for sale, 121
- contract by, 234
- not liable to third person for money due, 260

GRATUITIES

- to agent, effect of, 233

GRATUITOUS AGENT,

- negligence of, 107

GRATUITOUS UNDERTAKING,

- agent not bound to perform, 74
- exercise of skill in performance, 77—79

HARBOUR MASTER,

- acts of, liability for, 208

HOLDING OUT

- a person as agent, after revocation of authority, 284
- by conduct, 15
- by corporation, effect of, 32
- payment to agent held out to be principal, effect of, 201

HOME AGENT,

- contract by, foreign principal and right to sue or be sued on, 188
 - liability in respect of, 236
- definition of, 1
- unauthorised act by, 181

HORSE DEALER,

- implied authority to warrant, 56
- warranty given by, liability of principal for, 169

HORSES

- hired to coachman, 17
- sale of, warranty given by agent, 52

HOSPITAL,

- liability for negligence of staff, 215
- matron of, implied authority of, 54

HOUSE AGENT,

- care in ascertaining solvency of tenants, 78
- contract of sale by, acceptance by principal, 173
- duty to submit offers to principal, 75
- remuneration of, 121, 122, 123, 134
- rent book, etc., duty to hand over, 77 (n.)
- See also* ESTATE AGENT.

HUSBAND. See MARRIED WOMAN.**HYPOTHECATION**

- of ship, cargo or freight. *See under* SHIPMASTER.

ILLEGAL ACT

of servant, liability for, 286—289

ILLEGAL DISTRESS. *See* DISTRESS, wrongful.

ILLEGAL TRANSACTION,

account of, action by principal for, 91
no remuneration in respect of, 131

IMPLIED AUTHORITY,

agent employed in course of business or profession, 56
for sale, 47, 52
auctioneers, of, 62
bailiff, of, 53, 56
brokers, of, 61
circumstances of particular case, from, 46
coachman, of, 54
commercial traveller, of, 54
commission agent, 57
counsel, of, 62, 63
delegation by agent under, 69
factors, of, 60
farm bailiff, of, 53
foreman, of, 54
horse dealer, of, 56
hospital matron, of, 54
insurance agent, of, 54
broker, of, 56, 60
manager, of, 53, 54, 55
married woman. *See under* MARRIED WOMAN.
mining agent and manager, of, 55
nature of, 46
principal's conduct, from, 46
railway company's servants, of, 54, 55, 56
rent collector, of, 54
shipmaster, of, 64—68
ship's husband, of, 53
situation of parties, from, 46
solicitor, of, 63, 64
special customs, from, 58
Stock Exchange, 58, 59
to arrest offenders, 55
to do what is necessary for, or incidental to, execution of authority, 51
whatever is usually incidental in course of trade, etc., 56
to sign for purpose of Statute of Frauds, etc., 51
turf commission agent, of, 56
usage of trade, from, 46
warranty, authority as to giving, 47, 52
wife, of. *See* MARRIED WOMAN.

INCUMBRANCES,

where notice of, to solicitor is notice to client, 225, 226

INDEMNITY

against losses and liabilities, agent's right to, 135
incurred under rules or usages of particular markets, 138
none, in gaming or wagering contract, 141, 143
where act due to negligence, default, etc., of agent,
134, 141, 144, 145
unauthorised, 141, 145
transaction unlawful, 141, 142
agreement for, and liability of joint tortfeasors, 218 (n.)

INDUSTRIAL SOCIETY,

appointment of agent by, 31

INFANT,

agent of, contract by, 4
may act as agent, 5
necessaries supplied for, 24, 25

INFANT—continued.

- no authority to pledge parents' credit, 29
- power to appoint attorney, 4
- ratification of contract made while, 36

INJURY. See **WRONGS.**

INSANITY. See **LUNACY.**

INSOLVENCY. See **BANKRUPTCY.**

INSTRUCTIONS.

- disobedience to, liability of agent for, 104
- followed strictly, no liability attaching to agent, 103, 104

INSURANCE.

- contract of. See **INSURANCE POLICY.**
- failure to effect, measure of damages for, 110
- neglect of agent to effect, 104
 - of own motor car, 209

INSURANCE AGENT.

- acts of, liability of company as to, 170, 173
- implied authority of, 54
- knowledge of, when notice to company, 223, 225
- money received by, under mistake of fact, 256, 257
- neglect of, to effect insurance, 104
- no implied authority to receive overdue payments or grant policies, 54
- notice to, after revocation of authority, 285
- prevented from earning remuneration, 129, 130
- secret profit by, 96
- unauthorised act of, 174

INSURANCE BROKER.

- authority of, revocation of, 283
- breach of duty by, 106
- conversion by, innocent, 271
- diligence expected in procuring settlement, 79
 - in effecting insurance, 78
- duty as to insertion of clauses, 78
- implied authority of, 56
- interpleader by, 165
- knowledge of, in effecting policy, 223
- liability of, for negligence, 106
 - for premiums under policies effected, 102
- lien, general, by implication from custom, 147
 - of, as sub-agent, 160, 161
- money under policy received on behalf of principal, 80
- negligence of, 106
- payment to, by bill of exchange, 205
- premiums, liability for, 102
 - right to sue principal for, 166
- right to sue in own name on contract, 261
- set-off, right of, 137, 138
- settlement with, by way of set-off, 47, 60
- unauthorised act of, 174
- underwriters, duty to deduct from claim by, 81

INSURANCE COMPANY.

- legal proceedings controlled by, 99 (n.)

INSURANCE POLICY.

- knowledge of broker in effecting, 223
- liability of insurance broker for premiums under, 102
- lien on, 160, 161
- local agent, no implied authority to grant, etc., 54
- mutual insurance association, effected in, 187
- pledgee of, 13
- ratification of, 33, 36, 37, 44
- underwriter abusing authority, how far binding on principal, 167, 174

INTEREST,

- amount of, 115 (n.)
 - effect on pledge, 182
- award by Court on debt or damages, 77 (n.)
- payable on bribes, 112, 116
 - on secret profits, 116
- payment by agent, liability as to, 115
 - on money improperly received or dealt with, 115
 - on refusing to pay over money to principal, 115
- stakeholder not liable for, 116

INTERPLEADER,

- agent's rights as to, 164, 165

INTOXICATING LIQUOR,

- illegal sale of, by agent, liability for, 286, 287

JOBBER,

- liability on Stock Exchange contracts, 192, 193, 194

JOBMASTER,

- act of, liability for, 209

JOINT AGENT. See Co-AGENTS.**JOINT PRINCIPALS,**

- money received to use of, account of, 80

JOINT TORTFEASORS,

- contribution, recovery against, 218
- liability of, 142, 217, 218

JUDGMENT

- against agent in contract, effect of, 194
 - in tort, effect of, 217
- against principal, in contract, effect of, 248
 - in tort, effect of, 217

JUDICIAL SEPARATION,

- effect of, on authority to pledge husband's credit, 22

KNOWLEDGE,

- notice to purchasers for value, 226
- of agent, concealed from principal, 222
 - not in course of employment, not imputed to principal, 222
 - or principal, set up in defence to action by principal, 199
 - when equivalent to knowledge of principal, 222
- of company director or servant not imputed to company, 225
- of solicitor, and notice to client, 225

LAND,

- agent for purchase of, appointed orally, 30
- offer to purchase, to agent, 7

LANDLORD,

- agent of, acts of, liability for, 207
- distrain on behalf of, ratification of, 34

LEASE,

- contract for, 254
- grant of, without authority, 255

LEGAL PROCEEDINGS,

- solicitor retained by word of mouth, 30, 31

LIABILITIES

- indemnity against. *See* INDEMNITY.
- lien in respect of. *See* LIEN.
- under rules or usages of markets, 138—141

LIABILITY

- on contracts. *See under* CONTRACT.

LIBEL,

- publication of, liability for, 206, 216, 217
- recovery of expenses of, 201

LIEN,

- abandonment of, 161, 162
- advances by agent to principal, 135, 146
- agent's, authority to sue cannot be revoked to prejudice of, 278
- payment by third person for goods on which exists, 201, 204
- right to sue on contract when possessing, 261
- agreement inconsistent with, 149
- assignment, effect of, 163
- auctioneer, of, 147
- banker, of, 147, 149, 150, 158, 159
- bankruptcy of principal and agent's right to, 147, 148, 150, 162, 163
- charging. *See under* SOLICITOR.
- company books and documents, 157, 163
- consignee, of, for advances to apparent owner of goods, 183
- debt or obligation incurred in course of agency, 149
- deeds, on, 157, 158
- definition of, 146
- distinction between general and possessory, 146
- documents and papers, 149, 157, 163
- extinguishment of, 161, 162
- factors, of, 147—150, 158
 - and sale of goods in own name, 204
- general, agents having, by custom, 147
 - definition of, 146
 - exists only by agreement, express or implied, 147
- goods in the order and disposition of principal, 148
 - or chattels must be acquired in same capacity as in which lien claimed, 146, 149
 - in agent's possession, 148
 - obtained lawfully, 146, 149
- insurance broker, 147
 - as sub-agent, 160, 161
- policies, 160
- interpleader, effect on rights as to, 164
- loss of, 161
- maritime, 155, 156
- negotiable instruments, 156, 159
- packer's, 147
- parliamentary agent, 147
- particular, defined, 146
- possession of goods, 146, 147, 148
 - unlawfully obtained from agent, 162
- possessory, confined to rights of principal, 157
 - definition of, 146
 - extinguishment of, 162
 - money or negotiable securities, 156
 - particular, 146
 - right of, 146, 147
 - rights of third persons, effect of, 156
- right of, 146, 147
- securities taken in place of, 161, 162
- shipmaster, of. *See under* SHIPMASTER.
- solicitor, of. *See under* SOLICITOR.
- special purposes, property intrusted to agent for, 147, 149, 150
- Statute of Limitations, 192
- stockbroker, 147
- sub-agents, of, 159—161
- surrender of, 163
- trust property, on, 157

LIEN—continued.

waiver of, 161, 162, 163
warehouse manager, 148
wharfinger, 147, 158

LIGHTERMAN,

acts of, liability for, 208

LIMITATION. *See* STATUTES OF LIMITATION.

LIQUIDATOR,

delegation by, 70, 71
deputy or sub-agent, no implied authority to employ, 70

LLOYD'S,

custom to receive payment by way of set-off, 60

LOAN,

commission for procuring, sub-agent employed on, 72
power given to raise, in emergency, 169
refusal of principal to accept terms, remuneration after, 132
remuneration for securing, 122, 123, 124
to company, liability as to, 170, 171
See also ADVANCES.

LOCAL AUTHORITY,

inspection of accounts by agent, 7
liability for hospital staff, 215
mayor contracting on behalf of corporation, 263
wrongs of agent, liability for, 211, 214, 215

LOSSES

incurred by agent, lien in respect of, 146
indemnity against. *See* INDEMNITY.

LUNACY

of husband, liability for price of goods supplied to wife after, 284, 285
of principal, irrevocable authority not determined by, 276
revocation of authority by, 274, 279, 280

LUNATIC

manager under Lunacy Act as agent for, 12 (n.)
when bound by agent's contract, 4

MANAGER

absconding, liability for goods supplied to, 17
acting as principal, liability for acts of, 169, 170
criminal liability for acts of, 286
of bank, misappropriation by, liability for, 213
unauthorised act of, 174
of beer house, implied authority of, 53
of business, implied authority of, 53
of company, implied authority of, 55
liability for acts of, 171
of estate, implied authority of, 53
of mine, implied authority of, 55
of mutual insurance association, 263
of public-house, unauthorised purchase by, 173
of railway company, implied authority of, 54

MANAGING CLERK,

authority to withdraw from possession under *fi. fa.*, 63
fraud of, liability of principal, 211, 212
notice to, effect of, 224
tender to, operates as tender to solicitor, 169

MANAGING OWNER (of SHIP). *See* SHIP'S HUSBAND.

MARITIME LIENS, 155, 156

MARKET, CUSTOM OF. *See* CUSTOM.

MARKET OVERT,
sales in, 178

MARRIED WOMAN,

- admission by, when agent for husband, 220
- adultery by, connived or condoned by husband, 27, 28
 - effect on implied authority, 27
- allowance made to, effect of, 22
 - under separation agreement, effect of, 23
- as agent of necessity, 15, 20—25
- attorney appointed by, 4
- authority of necessity, 15, 20—25
- conduct of husband to justify leaving him, 26
- contract by, 20
- conversion by auctioneer of goods of, 272
- credit of husband, pledge of, 17, 20—25
 - authority withheld, 21
 - forbidden, 21
- debts for necessities, acknowledgment of, by, 28
- deserted by husband, 25
- disposal of property by, 4
- goods supplied to, after insanity of husband, 284, 285
 - husband sued jointly for, 196
 - liability for price of, 186, 196
 - of husband for, 17, 20, 196
- held out by husband as having his authority, 31
- housekeeper, implied authority as, 20, 21, 22
- implied authority to acknowledge debts for necessities, 28
- legal position of, 20
 - proceedings, costs of, 25, 26
- liability of, 4
- living with husband, agent in household matters, 20, 21, 22
 - no authority to borrow money, 20
 - presumption of authority, 20
 - how rebutted, 20
- relative, necessities supplied to, 28
- luxuries not included in necessities, 21, 22
- necessaries, acknowledgment of debt for, 28
 - ordered by, liability in respect of, 239
 - pledge of husband's credit for, 17, 20—25
 - suitable, presumption of authority confined to, 21, 22
 - supplied to, 15, 20—25
 - after adultery, 27, 28
 - death of husband, 251
 - husband not liable unless credit given to him, 28
 - what constitute, 21, 22
- purchase of goods in name of husband, ratification of, 41
- separated from husband, by mutual consent, 23, 24
 - cost of legal proceedings, 23, 25, 26
 - credit given to, 22, 23, 24
 - degree of misconduct which justifies leaving, 26
 - having custody of children, 24, 25
 - in consequence of husband's misconduct, 24, 25, 26
 - judicially, 22
 - liability under contract before decree, 23
 - money lent to, 25
 - necessaries supplied to, 22—25
 - prima facie* has no authority, 22, 23, 25
 - where no agreement as to maintenance, 24
 - without his consent, 25
- torts of, 20

MASTER OF SHIP. *See* SHIPMASTER.

MAYOR

- contracting on behalf of corporation, no right to sue in own name, 263

MEASURE OF DAMAGES. *See* DAMAGES, measure of

MEMORANDUM,

- agent's name entered in, at auction, 70
- authority to sign, agent, 14, 51
 - appointed verbally, 30
 - clerk of, 5, 70
- auctioneer, 5, 13, 82
- broker, 5, 61, 191
- counsel, 63
- solicitor, 64
- broker's signed bought and sold notes, 191
- one party cannot sign for other, 5

MEMORANDUM OF ASSOCIATION,

- not *ultra vires*, not capable of ratification, 34
- authority to subscribe may be verbal, 30

MERCANTILE AGENT,

- agreement made with clerk of, 180 (n.)
- definition of, 2, 3
- dispositions by, validity of, 179—183
- lien of consignee of goods for advances, 183
- ordinary course of business, 181
- See also* FACTOR; FACTORS ACT.

MINES,

- information laid by agent of inspector of, 7

MINING COMPANY,

- implied authority of manager and directors, 55

MISAPPROPRIATION,

- bankruptcy of agent after, 228—231
- by agent, money coming to principal through, 214
 - principal's liability for, 213

MISFEASANCE

- against principal by agent, knowledge not imputed to principal, 222, 226

MISREPRESENTATION

- by agent, as defence to action by principal, 199
 - as to credit of third persons, 218
 - knowing true facts, 212
 - principal's liability for, extent of, 199—201
- by directors in prospectus or notice, 273 (n.)
- fraudulent, of agent, liability for, 211, 212
- knowledge of true facts by principal, 212
- made on behalf of principal, liability for, 267

MISTAKE,

- auctioneer, by, in selling without reserve, 169
- money paid by agent by, right to sue for, 266
 - to agent by, 80
 - recovery of, 80, 255, 257

MONEY

- assigned by principal to third person, payment of, 258, 259
- coming to principal through wrong of agent, 213, 214
- due to third persons, public agents not liable for, 260
- misappropriation by agent, principal's liability for, 213
- paid by mistake, agent's right to sue for, 266
 - recovery of, 255, 257
- payment of. *See* PAYMENT.
- protection of, care and diligence in, 78
- received by agent, duty to pay over to principal, 77, 79
 - for principal's use, agent may not appropriate to own debt, 81
 - agent's duty to pay over, 79
 - assigned by principal to third person, 258

MONEY—continued.

- received by agent, for principal's use, credit for allowances and sums expended, 80
 - in respect of void or illegal transaction, 80
 - not accountable to third person, 259
 - personal liability of agent, 255, 256
 - to repay, 255, 256
 - demand for more than is due, 256
 - obtained by duress, 255, 255 (n.), 256
 - obtained by fraud or wrongful act, 255, 256
 - received by mistake, 255, 257
 - for use of third persons, personal liability to pay, 258
 - paid to agent's banking account, 77
 - refusal to pay over, 77
 - retained for investment, 77
 - under mistake of fact, repayment of, 80, 255, 257
 - wrongfully, repayment of, 80
 - by turf commission agent, 81
 - for particular purpose, 258—260
 - to use of two or more principals, account of, 80
- recovery of, power of attorney and, 49, 50

MONEY-LENDER,

- pledge to, and Factors Act, 182

MORTGAGE

- by agent entrusted with title-deeds, 176, 177
- notice as to existence of, 224

MORTGAGEE,

- receiver appointed by, 11
- right to account from receiver, 12
- solicitor as, duty of, 89

MORTGAGOR

- in possession, agency of, 13

MOTOR CAR,

- injury caused by, liability for, 207
- unauthorised user of, damage resulting from, 209, 210

MUNICIPAL CORPORATION,

- appointment of agent by, 31 (n.), 32
- mayor contracting on behalf of, 263
- wrongs of agent, liability of local authorities, 211, 214, 215

MUTUAL DEALINGS,

- authority given in course of, 282

MUTUAL INSURANCE ASSOCIATION,

- manager's right to sue in own name, 263

NECESSARIES. See CHILDREN; INFANT; MARRIED WOMAN; SHIPMASTER.**NECESSITY,**

- agent of, 11, 14, 15
 - married woman as, 15, 20—25
 - shipmaster as, 68

NEGLECT OF DUTY,

- remedy for, 111

NEGLIGENCE,

- act not in course of employment, liability for, 210, 211
- counsel not liable for, 103
- damages for, measure of, 109

NEGLIGENCE—continued.

effect on remuneration, 132, 134

gratuitous agent, of, 107

liability of agent to principal for, 103, 104

acting in ordinary course of business, 105

broker selling at lower price than authorised, 105

damage must be legal damage, 107

delivery of goods without payment, 104

except where following instructions, 103

of auctioneer, 105, 106

of gratuitous agent, 107

of directors, 105, 106, 107

of insurance broker, 106

of solicitor for, 108, 109

losses and liabilities due to agent's own, no indemnity against, 141, 145

meaning of, 104

nominal damages for, 107

of banker, 105

of driver of vehicle, liability for, 207, 209, 210

of medical staff, liability for, 215

of omnibus driver, liability for, 210

of pilot, 208

of servant, criminal liability for, 287

of solicitor's town agent, 117

of sub-agent, 117

NEGOTIABLE SECURITIES,

pledge of, fraudulent, by broker, 178

unauthorised dealings by agent with, 177

NON-DISCLOSURE

of facts, by agent, 199, 200, 222—226

by principal, 199

NOTICE,

fraud upon principal, knowledge of, not imputed to principal, 222 224

of revocation of authority to third persons, 284

to agent, duty to communicate to principal, 222

of ferocity of dog, 223

when equivalent to notice to principal, 222

to clerk, as to notice to company, 224

of solicitor, 224

to company director officer, 225

to partner, 10

to purchasers for value, 226

to quit, ratification of, 38

served on servant, 224

to solicitor, and notice to client, 224

NURSE.

liability of hospital authority for acts of, 215

OFFER,

acceptance of, ratification of, 37

OMISSIONS

by agent. *See* WRONGS OF AGENT.

OMNIBUS,

negligence of driver of, liability for, 210

PACKER,

lien, general, by implication from custom, 147

PARENT,

credit pledged by child, 29

PARLIAMENTARY AGENT,
lien of, 147

PART OWNER
of ship, contract by, liability as to, 186, 187

PART PAYMENT
of debt, effect of, 220, 221

PART PERFORMANCE,
no remedy on doctrine of, on breach of warranty of authority, 256

PARTNER,
act of, liability of other partners for, 9, 174
admission or representation made by, as evidence, 10
agent of, discharge of, 8
as agent of firm and other partners, 9
authority of, 9, 10
 on dissolution, 47
 to execute a deed, 31
copies from partnership books by agent of, 7
credit of firm pledged by, 10
death of, effect on agency, 279, 280
 effect on liability, 15
ex contractu liability, 10
fraud by or with consent of, 10
misappropriation of money or property of third person, 10 (n.)
notice to, 10
person representing himself to be, 15
personal liability of, 10
restriction placed on agency of, 10 (n.)
secret profit by, 94
trust property improperly employed by, 10 (n.)
wrongful act or omission of, liability for, 10

PARTNERSHIP,
change in, 15 (n.)
 effect on remuneration of agent, 129
 of solicitor, 133
dissolution of, authority given to partner at, 47
partners. *See* PARTNER.
trading, authority of persons in, 10

PATENT,
infringement of, liability for, 207, 288

PARTY,
to action, addition of, under Ord. XVI., r. 11...

PATENT AGENT
expected to know law relating to patents, 79

PAWN. *See* PLEDGE.

PAWNBROKER,
pledge to, and the Factors Act, 182, 182 (n.)

PAYMENT
authority to receive, 46—48, 54
by principal to agent, how far binding on third persons, 197, 198
by third person to agent before money is due, 47
 by bill of exchange, 205
 by cash, 204, 205
 by cheque, 47
 custom to receive by way of set-off, 58
 for sale, 205
 ought to be in cash, 46
 principal bound by, when, 201
set off, by. *See* under SET-OFF.

PAYMENT—*continued.*

- by third person to agent where agent has a lien, 201, 204
 - is held out as principal, 201, 202
 - to auctioneer, 204
 - to broker, 198, 199, 203
 - to principal, in action by agent on contract, 204
 - to sub-agent, 72
- implied authority to receive, 54
- lien of agent, payment for goods on which exists, 201, 204
- remuneration as. *See* REMUNERATION.
- to London agent of broker, 204
- to person apparently authorised to receive, 18
- unauthorised act of agent, 214
 - ratification of, 37

PER PROCURATION,

- signature on bill of exchange, 183

PERFORMANCE

- of undertaking, duty as to, 74
- part, no remedy on doctrine of, on breach of warranty of authority, 255
- specific. *See* SPECIFIC PERFORMANCE.

PERSONAL DISCRETION,

- exercise through agent of, 7

PERSONAL INTEREST

- of agent, must be disclosed to principal, 84

PERSONAL REPRESENTATIVE,

- agent of, 116 (n.)

PILOT,

- negligence of, liability for, 208

PLEDGE

- by agent for sale, no authority as to, 57
 - set-off against principal, 203, 204
 - with apparent ownership, 176
- by broker, 61, 176
- by factor, no implied authority to, 60
 - wrongful, principal may adopt transaction, 81
- by mercantile agent, validity of, 179
- definition of, for purposes of Factors Act, 179 (n.)
- fraudulent, by broker, 177, 178
- husband's credit. *See* MARRIED WOMAN.
- in ordinary course of business, 182
- of documents of title deemed pledge of goods, 180
- of shares not covered by authority to sell, 57
- rate of interest, effect of, 182
- redemption of goods by owner, 180 (n.)
- unauthorised, 179
 - to person with notice, 183

POLICY. *See* INSURANCE POLICY.

POSSESSION,

- agent having, deemed to be owner by principal's conduct, 201
- by consent, Factors Act and, 181, 182
- given to agent for purpose of consignment, 183
- meaning of, for purposes of the Factors Act, 179 (n.)
- obtained by fraud, operation of Factors Act and, 181
- transfer of, amounting to conversion, 269, 270

POSSESSORY LIEN. *See* LIEN.

POWER OF ATTORNEY,

- absence of principal, during, 49
- abuse of, 187
- acts done under, after revocation by or disability of donor, 285
 - without concurrence of donee, effect on revocability, 278
- agent acting under, without notice of revocation, 285
- agreement to ratify and confirm acts done under, 51
- authority given by, 49
- bills of exchange, acceptance, etc., under, 50
- construction of, 49—51
- execution of deeds under, 76, 188, 189
- formal act under, bankruptcy of donor and, 282
- general words in, 49—51
- irrevocable in favour of purchasers for value, 278
 - when, 276
- medium powers included in, 49
- operative part, controlled by recital, 49

PREMIUMS,

- liability of insurance broker for, 102

PRINCIPAL,

- absence of, power of attorney during, 49
- account of agency to, liability of agent as to, 72
- action by, on contract by agent, defence to, 199
- acts of agent, how far binding on, acts within actual or apparent scope of authority, 167
 - acts beyond scope of authority, 172
 - not done in course of employment, 172
 - advances to agent as apparent owner of goods, lien of consignee for, 183
 - agent intrusted with apparent ownership of property, 175, 176
 - agent intrusted with title-deeds, 176
 - dealings with money and negotiable instruments, 177
 - dispositions by agent intrusted with apparent ownership, 175
 - dispositions by agent intrusted with title deeds, 176
 - dispositions protected by Factors Act, 1889...179
 - sales in market overt, 178
- unauthorised, not binding with respect to persons with notice, 183
- acting as agent, right to sue, 261
- agent contracting with, 86, 87
 - held out to be owner of goods by conduct of, 201
- assent of, in constitution of relation of agency, 11
- bankruptcy of. *See under* BANKRUPTCY.
- bill of exchange, liability on, 189
- bills, notes and cheques, liability as acceptor, 189, 190
- capacity to act as, 4
- conduct of, authority implied from, 46
- contract by agent. *See under* CONTRACT.
- criminal liability of, for acts of agent, 286—289
- customs and usages of particular market, bound by, 191, 192
- death of, revocation of authority by, 279, 280
- deeds executed by agent, and right to sue or be sued on, 188
- disclaimer of responsibility for agent's statements, 211
- disclosure of, right to sue after, 194—197
- duties which agent cannot execute, 6
- evidence as to who is, 185, 186
- fictitious or non-existent, contract on behalf of, 248
- foreign. *See* FOREIGN PRINCIPAL.
- fraud by, effect of, 199
- insanity of, revocation of authority by, 279, 280
- judgment against agent, effect of, on right to sue principal in contract, 194, 195
 - in tort, 217
- known, credit given to agent when, 195
 - judgment against agent when, 195

PRINCIPAL—*continued.*

- liability of, for unauthorised act of agent, 181
 - for wrongs of agent. *See* WRONGS OF AGENT.
- misrepresentation by, agent knowing true facts, 212
- money received for use of, 255
- negligence of agent. *See* NEGLIGENCE.
- notice to, when notice to agent equivalent to, 222
- professing to be agent, 248
- prohibition by, effect of, 209
- property of. *See under* PROPERTY.
- ratification by. *See* RATIFICATION.
- refusing to complete transaction, 127
- representing agent to be owner of his property, 175, 176
- relationship of, and agent, constitution of, 11
- right to sue after disclosure of, 194—197
 - and be sued in own name, 185, 186
 - effect of judgment against agent on, 194, 217
 - on bills, notes and cheques, 189, 190
 - on deeds, 188
 - subject to customs and usages of market, 191, 192
- sub-agent and, relations between, 71, 72
- title of, agent estopped from denying, 81, 82
- two, which is liable, 212
- unauthorised acts of agent, how far binding, 167, 172
 - not binding upon, in respect of persons with notice, 183
- undisclosed. *See* UNDISCLOSED PRINCIPAL.
- wrongs of agent, liability for. *See* WRONGS OF AGENT.

PRIVATE DEBT

- of agent, payment obtained for, 172

PRIVATE INSTRUCTIONS,

- effect on third persons, 168

PROFIT. *See* SECRET PROFITS.

PROMISSORY NOTE,

- acceptor of, liability of, 190
- agent's liability on, 241—243
- given by manager and director of company, liability for, 173
- issued to agent in blank, 168
- liability on, 189
- signature on, effect of, 189, 241
 - "per procuration," 183

PROMOTERS,

- company. *See under* COMPANY.

PROPERTY

- of agent, sale to principal may terminate agency, 87
- of principal, duty of agent to keep separate, 76
 - in possession of agent, as evidence of principal's title, 81
 - mixed with agent's, 77
 - effect of agent's bankruptcy, 228, 231
 - protection of, care and diligence in, 78
 - title denied by agent, 81, 82
- principal's right to follow, as against agent's trustee in bankruptcy, 228
 - into hands of third persons, 227
- privilege from distress of goods in hands of agent, 231

PROVIDENT SOCIETY,

- appointment of agent by, 31

PUBLIC AGENT

- contracting for Crown or Government, not liable on contract, 234
 - remedy, 234 (n.)
- Crown may sue or be sued on contracts by, 185
- definition of, 1

PUBLIC AGENT—continued.

- injunction against, 269
- not accountable for funds voted by Parliament, 261
- not liable to third persons for money due, 260
- pledge of personal credit by, liability for, 234
- principle of implied warranty of authority not applicable to, 234 (n.), 249 (n.)
- ratification of act of, in excess of authority, 33
- wrongs by, Crown not liable for, 205, 235
 - liability for, 266, 267

PUBLIC NUISANCE,

- liability for, 288

PUBLIC SERVANT,

- bribery of, 114 (n.)

PURCHASE, AGENT FOR,

- appointed orally, 30
- bribery of, 114
- duty to examine takings, etc., on purchase of public-house, 78
- inferior quality goods bought by, 110
- personal interest, disclosure of, 84, 85
- purchasing in own name, 86
- receipt of purchase money by, 52

PURCHASER,

- agent acting for vendor and, 76
- difference between *del credere* agent and, 3

QUANTUM MERUIT,

- claim for, excluded by express contract, 123
- right of agent to, 119, 120

RAILWAY COMPANY,

- admission by servant, liability for, 220
- appointment of servant by, 31 (n.)
- implied authority of servants, 54, 55, 56
- liability of, for acts of servants, 216

RATIFICATION,

- abandonment under policy of insurance on ship, 38
- acceptance of offer, 37
- acts imposing duties on third persons, 36
 - void at inception not capable of, 33
- assault, act of, 34, 43
- bankrupt, sale or purchase on behalf of, 41, 44
- bill of exchange, agent suing on, 34
- circumstances in which it may take place, 36
- company, by, 41
 - acting, in excess of powers but not *ultra vires*, 41
 - ultra vires*, 34, 36
 - directors, of goods purchased by, 42
 - offer to, 39
 - notice of meeting, 44
 - promoters, acts of, 35
- conditions necessary for, 39
- conduct implying, 40
- contract, of, 33, 43
 - as to price, 35
 - breach of, acts done in, 44
 - fraudulent or voidable, 42
 - of insurance, 37
 - right of action for breach, effect on, 43
 - time for, 37
 - written, ratification need not be in writing, 40
- conversion, amounting to, 34, 40, 43

RATIFICATION—continued.

- Crown, 33, 43, 45
- debt, demand for payment of, 38
 - payment of, 39
 - plea of, 42
- deed, execution of, 41
- distrain in name of landlord, 34
- distress on goods, 38, 40, 42, 43
 - wrongful, 39
- effect of, 42
- equivalent to previous authority, 33
- executor, by, 44
 - of principal, by, 38
- express, 40
- forgery of signature not capable of, 34
- goods, demand for return of, 38
- implied, 40
- infant, contract made while, 36
- insurance contract, 37
 - policy, 33, 36, 44
- married woman, purchase of goods by, 41, 42
- notice to quit, 38
- offer, acceptance of, 37, 39
- part, in, 40
- payment of money, 37
- persons having power of, 35
- power of attorney, under, 51
- purchase price paid by factor, 44
- rents and profits, action for, 42
- sale of ship, 34, 41, 44
- shareholders, by, 41
- sheriff, seizure by, 35
- stoppage *in transitu*, 38
- sub-agent, act of, 44
- time within which it may take place, 37
- trustee in bankruptcy, by, 41, 44
- volunteer corps, acts on behalf of, 36
- what acts are capable of, 33, 34
- who has power of, 35
- wife, act on behalf of, 35
- writing, need not be in, 40
- wrongful act, of, time for, 37

RECEIVER

- appointed by debenture holders, 12
- by mortgagee, 11

REMUNERATION,

- agent wrongfully prevented from earning, 127
- amount of, ascertained by custom or usage, 118
 - unspecified, 118, 119
- auctioneer selling privately, 133
- "bad debts" and payment of commission, 119
- bankruptcy of principal, 122
- barrister, not recoverable by action by, 118
- binding agreement with principal, procuring, 125
- breach of duty, wilful, 132
- bribery, forfeited in case of, 112
- business resulting after termination of agency, 121, 123, 124
 - from agency, 120
- completion of transaction, 121
- contract for payment of, express, 118
 - implied, 118
- custom, contract for payment of remuneration implied from, 118
- death of agent, effect of, 120, 124
- depending on completion of contract, 120, 126
 - on success, 119
 - upon event, 126
- determination of agency and payment of, 124, 127
- discounts received, effect of, 133

REMUNERATION—*continued*.

- estate agent, 121, 122, 123
- express contract for payment of, 118
- from third persons, misapprehension as to extent of, 96
 - principal misled as to extent of, 93
 - with knowledge of principal, 93, 96
- gaming transactions, 131, 132, 133
- house agent, 121, 122
- illegal transactions, 131
- implied contract for payment of, 118
- inquiries resulting in business, 123
- letting of estate leading to purchase, 121
- lien in respect of. *See* LIEN.
- loans, procuring, 122, 123, 124
- negligence, effect of, 132, 134
- no benefit accruing to principal, 124
 - through negligence, 132
- payable on performance of undertaking, custom as to, 124, 126
 - on transactions resulting from agency, 120
- payment of, time for, 124
- principal getting no benefit, 124
- professional man, employment of, 119
- quantum meruit*, claim for, excluded by express contract 123
 - right to, 119, 120
- reasonable, in absence of express contract, 118
- refusal of principal to complete transaction, 127
- relationship of buyer and seller, bringing about, 122
- remoteness of transaction, 121
- revocation of agency and payment of, 127
- right of agent to, 118
- sale by agent to himself, 121, 130
 - by company director to own company, 133
 - by principal without agent's help, 130
- secret profit, effect of taking, 133
- service creates no right to, 119
- shipbroker, 120
- "sole agent" and sale by owner, 130
- solicitor, costs of, when payable, 126
 - effect of negligence on, 134, 135
 - when not entitled to, 133
- termination of agency, business resulting after, 121, 123, 124
- time when payment is due, 124
- transaction directly resulting from agency, 120
 - falling through, 124
- ultimate business resulting from agency, 123
- unauthorised transactions, 132
- unlawful transactions, 131
- unspecified, 118
- usage, contract for payment of remuneration implied from, 118
- wagering transactions, 131
- where principal acquires no benefit, 124

RENT,

- distress for, ratification of. *See* RATIFICATION.

RENT COLLECTOR,

- implied authority of, 54
- principal's title denied by, 82

RENUNCIATION

- of agency, 341

REPAIRS

- to ship. *See* under SHIPMASTER.

REPAYMENT

- of money received by agent for principal's use, 255

REPRESENTATIONS

- as to authority, 249
- by agent, when evidence against principal, 219

REVOCACTION,

- authority irrevocable, when, 275—278
 - to pay money to third persons, 276, 278
 - to sue, when irrevocable, 278
- before sale is effected, 129, 130, 283
- by bankruptcy of agent, 281
 - of principal, 280
- by death, 279, 280
 - of principal, right to remuneration after, 132
- by insanity, 279, 280
- by notice, 282
- notice of, protection of agent acting under power of attorney without, 285
 - to third persons of, 284
- powers of attorney irrevocable in favour of purchasers for value, 278
- refusal to return goods by factor after, 181
- remuneration after, 127
- third persons, notice to, 284
- time for giving notice of, 282
- verbal, 283

See also DETERMINATION OF AGENCY.

SALE,

- contract of. *See* CONTRACT.
- of goods, buyer as agent of seller, 14
 - by person in possession, 16
 - memorandum to satisfy Act. *See* MEMORANDUM.
- purchase money, receipt of, ratification by, 41
- "subject to contract," 127
- under decree, agent of parties to suit, 14

SALE, AGENT FOR,

- account, 91
- auctioneer as, 62
- cancellation of sale by, 57
- compulsory purchase, effect of, 121
- delegation by, 70
- implied authority, 46, 47, 52
 - factors, 60
 - to sell on credit, 58
- offer of amount stipulated for, 128
- outlay of time and money, 128
- payment to, 205
- pledge, no authority to, 57
- prevented from earning remuneration, 128, 130
- purchase of property by self, 85
 - by sub-agent, 93
- "sole agent," sale effected by owner, remuneration, 130
- sub-agent must account for profits, 71, 72
- title denied by, 83
- warranty given by, 52

SALVAGE,

- shipmaster's implied authority as to, 65

SEAL,

- authority given under, 46
 - revocation verbally, 283
- contract under, agent's liability on, 240

SECRET PROFITS,

- account of, 92—95
- broker making, 93
- company directors, 95, 96
- discounts allowed to agent, 94
- insurance agent, 96
- interest payable on, 116
- knowledge of principal, 93
 - as to extent of remuneration, 96

SECRET PROFITS—continued.

- partner making, 94
- payment over to principal of, 92
- remuneration; effect on, 133
- sale by agent of own property, 97
- shares, in sale of, 94
- sub-agent, by, 93
- trustee of will, 94
- where no account remains to be taken, 93, 94

SECRETARY OF COMPANY. *See under COMPANY.*

SECRETARY OF STATE. *See PUBLIC AGENT.*

SEPARATION

- of husband and wife. *See MARRIED WOMAN.*

SERVICE OF WRIT

- on agent of foreign corporation, 6

SET-OFF

- by agent on principal's bankruptcy, 282, 282 (n.)
- by banker, of one account against another, 178
- by third person of agent's debt, against agent holding out to be owner, 201, 202
 - principal, 201, 202
 - brokers, in case of, 203
 - debts must be liquidated, 203
 - factors, in case of, 202
 - founded upon estoppel, 203
 - no right unless agent is thought owner, 201
 - where agent possesses goods or documents, 201
- custom to receive payment by way of, 58, 60, 202
- defence of, in action by agent on contract, 264, 266
- payment by third person to agent, 47
 - way of, no authority to receive, 47
- right of, by agent for costs of legal proceedings, 137
 - losses and liabilities, 135
 - by broker, 137
 - by insurance broker, 60, 137
- settlement by insurance broker by way of, 60

SETTLEMENT. *See PAYMENT.*

SHAREHOLDERS,

- ratification by, 41

SHARES,

- authority to sell, no authority to pledge, 57
- sale of mortgaged property of company by sale of, 120
- secret profit in sale of. *See SECRET PROFITS.*

SHERIFF,

- acts of, liability for, 208, 269
- execution creditor cannot ratify acts of, as such, 35
- fees, liability of solicitor for, 239

SHIP. *See under SHIPMASTER.*

SHIP BROKER,

- charterparty, remuneration on hire earned under, 128
- negligence of, effect on remuneration, 134
- prevented from earning remuneration, 128, 129
- remuneration where contract not completed, 120
- signing charterparty, authority of, 252
- termination of charterparty by sale to charterers, 128, 129

SHIPMASTER,

- admission by, liability for, 220
- agent of necessity, as, 14, 17

SHIPMASTER—continued.

- authority to sell or hypothecate ship or cargo, extent of, 64, 66, 67
- bill of exchange drawn by, 242
- bills of lading. *See* BILL OF LADING.
- borrow money, authority to, 66
- cargo, sale and hypothecation of, 66—68
- carrying own cargo, account of freight, 94
- charter of ship in own name, no right to sue, 264
- charterparty executed in name of, 189
 - implied duty to enter into, 65
- conveyance of merchandise, authority to contract for, 65
- criminal act of, 286
- delegation of authority to sell by, 70
- duties of, 98
- hypothecation of ship, cargo or freight by, 64, 66, 67
- implied authority of, what included, 65—68
- knowledge of, when notice to owner, 223
- liability of, as to seamen's wages, 239
 - for negligence, 106
 - under bill of lading, 239
- lien, enforcement of, 155
 - for disbursements and liabilities, 155, 156
 - for freight and general average, 155
 - for wages, 155, 156
 - loss of, 155
 - priority of, 156
 - remains attached to ship, 155
 - surrender of, 162
- misconduct, wilful, effect on remuneration, 133
- necessaries bought by, 14, 17
- no implied authority, to sell entire cargo, 67
 - to sign bill of lading at lower rate, 68
 - to vary contract made by owners, 68
- pledge principal's credit, authority to, 66, 67
- repairs to vessel, 66, 67
- sale of cargo by, unnecessary, 209
 - of ship by, 64, 67
 - ratification of, 34, 41, 44
- salvage agreement, authority to make, 65, 66
- supplies, liability for, 94
- towage agreement, authority to make, 65
- trading on own account unlawful, 98
- voyage, authority to change, 68
- wages of seamen, liability for, 239
- whole time service of, 98

SHIPOWNER,

- liability for necessities supplied to master, 14, 17
 - shipmaster's acts, extent of, 65
 - on bill signed by master, 17
- part-owner, contract by, liability as to, 186, 187
 - interpleader by, 185
- ratification by, 34

SHIP'S HUSBAND,

- account by, 95
- implied authority of, 53

SIGNATURE,

- agent's sufficient, when, 8
- forgery of, not capable of ratification, 34
- on memorandum. *See* MEMORANDUM.
- "per procuration," effect of, 183
- principal's, when essential, 7

SKILL,

- degree of, a question of fact, 78
 - expected, 77, 78
- exercise of, agent's duty as to, 77—79
 - by broker, 88
- reasonable in performance of duties, 79

SOCIETY,

industrial or provident, appointment of agent, 31
 unincorporated, all members liable for agent's acts, 19

"SOLE AGENT"

for sale of goods, 130
 property, 130

SOLICITOR,

abandonment of cause by, 63, 100, 106
 acting without authority, effect on action, 252
 action, authority as to conduct of, 63
 institution of, 64
 allowing judgment to go by default, 108, 109
 arbitration, implied authority to refer to, 63
 arrest, wrongful, liability for, 269
 attachment of, 116 (n.)
 bankruptcy of client and money paid to, 281
 purchase from trustee, 88
 petition maliciously presented by, 267, 268
 breach of duty by, 105, 106, 108, 109
 certificate not in force, action for costs where, 131
 charging lien. *See under "lien," below.*
 cheque, authority to accept, in lieu of cash, 64
 clerk of, acts of, liability for, 212
 contract made in firm's name by, 186
 managing clerk. *See MANAGING CLERK.*
 notice to, 224
 tender to, operates as tender to solicitor, 169
 compromise entered into by. *See COMPROMISE.*
 contract by, liability in respect of, 236, 237, 244
 made in firm's name by clerk of, 186
 costs incurred after death of client, 280
 costs of conducting suit, when payable, 126
 counsel, pledge of client's credit to, 64
 debt, implied authority to receive, 63
 delegation to town agent, 71
 determination of authority of, 274, 275
 director of company, employment of, 95, 96
 disclosure by, in transaction with client, 88
 disobedience of instructions by, 105
 distress by, liability for, 269
 duties of, as to employment of counsel, 100
 as to offers of compromise, 99
 as to remuneration, 100
 as to unusual expenses, 100
 in contracting with client, 100
 in preparation of deed, 100
 not to act for client's opponent, 100
 secrecy, 99, 100
 to check useless litigation, 99
 to continue conduct of cause, 100
 to disclose personal interest in sale, 84, 85
 to give personal service, 99
 to know and observe rules of Court, 99
 to obey instructions, 75, 99
 where gift is made by client to person in fiduciary position, 101
 enemy alien, of, 275
 error of judgment, liability for, 108
 execution, agreement to postpone, 64
 expenses, reimbursement of, where negligent, 145
 witnesses, of, 239
 false imprisonment, liability for, 269
 forging client's signature, effect of, 177
 former clients, relations with, 100
 fraud by, liability for acts, 171, 270
 gift by client to, 90
 implied authority of, 63, 64
 interplead, authority to, 64
 journeys, authority to make, 64

SOLICITOR—continued.

- knowledge of incumbrances as notice to client, 225, 226
- liability of, for acts of clerk, 212
 - for breach of duty, 105, 106, 109
 - for error of judgment, 108
 - for false imprisonment, 269
 - for negligence, 108, 109
 - in directing sheriff, 208
 - in respect of expenses, 239
- lien, charging, of, 152
 - applies only to proceedings in Court of justice, 152
 - attaches only to general result of cause, 154
 - costs of appeal, 153
 - effect of compromise, 154
 - nature of, 153
 - order as to, 153
 - priority of, 153
 - property subject to, 152
 - set-off of costs, etc., 154
 - town agent, rights of, 155
 - will pass to assignee or representative, 152
- of, confined to taxable costs, charges and expenses, 151
 - deeds, 157
 - documents and papers, 151, 152, 157, 158
 - general, 151
 - by implication from custom, 147
 - of London agent, 161
 - in mortgage transactions, 156, 157, 158, 162, 163
 - loss of, 162
 - none on company books, 157
 - on trust property, 157
- London agent. *See* "town agent," *below*.
- managing clerk. *See* MANAGING CLERK.
- memorandum, authority to sign, 64
- mistake, liability for, 108
- money received on behalf of client, 80
 - by, for principal's use, liability as to, 256, 257
- mortgage debt, authority to receive, 64
- negligence of, effect on remuneration, 134, 135
 - in effecting mortgage, 110
 - liability for, 108, 109
 - losses due to, 145
- notice to, as notice to client, 224
 - to purchasers for value, 226
- omissions by, 109
- payment of interest on client's money, when liable for, 115
- pledge of client's credit to counsel, 64
- purchase money, authority to receive, 64
- remuneration on termination of suit, 126
 - when not entitled to, 133
- retained by married woman, costs as to, 23, 26
 - by word of mouth, 30, 31
- rules, ignorance of, 108
- satisfaction, authority to proceed to, 63, 64
- seizure of particular goods by sheriff, authority to order, 64
- stakeholder, as, 101
- statements by, evidence against client, 221
- town agent of, 71, 73
 - and client, no privity of contract between, 73
 - charging lien and, 155
 - general lien and, 161
 - negligence of, 117
 - order to pay money received to client, 73
 - retention of money paid by client to solicitor, 73
- trespass and case, distinction between, in action against, 269
- undertaking, authority to give, 63
- want of care on part of, liability for, 108
- witnesses, liabilities for expenses of, 239

SPECIFIC PERFORMANCE,

misrepresentation, fraud, etc., and, 200
of contract of agency, 19

STAKEHOLDER,

auctioneer as, 98
authority to pay, revocation of, 283, 284
interest not payable by, 116
solicitor as, 101

STATUTE OF FRAUDS,

memorandum to satisfy. *See* MEMORANDUM.

STATUTE OF LIMITATIONS.

admission by agent, 220
breach of duty by agent, 103 (n.)
bribery of agent, 112
implied authority of wife to acknowledge debts for necessities interrupts operation of, 28
part payment, 220, 211
right to plead, 92
title acquired under, 81, 82
trust property, title to, 92

STOCK EXCHANGE,

customs of, how far binding on principal, 192, 193
rules and regulations of, how far binding on principal, 192, 193
usage of, authority implied from, 59, 60
 broker acting for several principals, 59
 liabilities incurred by, 138—141
 name of purchaser, 193
 orders for several principals in one contract, 194
 purchasers on behalf of undisclosed principal, 193, 194
 registration of shares, 193
 right of principal to sue and be sued, 193, 194
 splitting order, 193
 wagering contracts, 143

STOCKBROKER,

account by, 94, 95
acting for both buyer and seller, 238
 on instructions from client's solicitors, 237
authority implied from custom of the Stock Exchange, 59, 60
Banking Companies (Shares) Act, 1867, ignored by, 140
breach of duty by, losses due to, 145
clerk of, authority of, 17
 misappropriation by, 18
closing account, when justified, 140, 141
 wrongfully, measure of damages for, 111
credit sale, unauthorised, 46, 173
death of client, effect on transaction, 279
default of, rights and liabilities of principal on, 194
determination of authority of, 274
duty not to buy own shares, 84
duty to sell for ready money, 75
expenses, reimbursement of, 142, 143, 144
illegal transactions by, effect on remuneration, 131
implied authority of. *See under* BROKER.
 warranty of authority, 251
indemnity against losses, 144, 145, 146
insolvency of, losses due to, 145
interpleader by, 165
liability for contract entered into on behalf of principal, 102
 incurred by usage of Stock Exchange, 138—141
lien, general, by implication from custom, 147
omissions by, measure of damages for, 110
right to indemnity against losses and liabilities, 136
settlement with agents by way of set-off, 60
several principals, one contract on behalf of, 194

STOCKBROKER—continued.

- solicitors of client instructing, 237
- splitting orders, 193
- unauthorised act, losses and liabilities incurred by, 144, 145
- See also* BROKER.

STOPPAGE IN TRANSITU,

- agent's right as to, 164
- lien of agent not revived by, 163
- ratification of, 38

STRIKES AND LOCKOUTS,

- acts in furtherance of, liability of trade union, 217

SUB-AGENT,

- account of agency to principal, no liability as to, 72
- agent and, rights and duties arising from contract, 71, 72
- appointed without authority, principal not bound by acts of, 71
- breach of duty by, 117
- duty to account to agent, 72
- employment of, by usage of trade, 69
 - implied authority for, 69—71
- for sale, purchase of the property by, 93
- fraud of, liability for, 117
- liability of agent for acts of, 116
- lien of, 159—161
- negligence of, 116
- payment by third person to, 72
- principal and, relations between, 71
- profits to be accounted for, 71, 72
- ratification of act of, 44
- secret profit by, 93
- solicitor as town agent, 71, 73, 117
- wrongs of, agent not liable for, 273
- See also* DELEGATION.

TENANT,

- goods supplied to, 23
- purchasing estate, effect on agent's remuneration, 121

TENDER

- to managing clerk, operates as tender to solicitor, 169

TERMINATION OF AGENCY. *See* DETERMINATION OF AGENCY.

THEFT,

- acts for protection of goods against, 211
- of goods, liability for custody and, 209

THIRD PERSONS,

- acts imposing duties on, ratification of, 36
- credit, etc., of, misrepresentations by agent as to, 218, 219
- definition of, 1
- effect of ratification of unauthorised act on, 42, 43
- interpleader by agent, 164, 165
- money received by agent for use of, 258
- notice of revocation to, when necessary, 284
- principal's right to follow property into hands of, 227
- rights of, effect on agent's lien, 166
- set-off by, against principal, of agent's debt, 201, 202
- title of, against title of principal, 82

TITLE.

- documents of, agent in possession of, dispositions by, 179
 - meaning of, 179 (n.)
 - transfer of, modes of, 180 (n.)
- of agent, against principal's, 82, 83
- of principal, agent estopped from denying, 81, 82

TITLE—continued.

- of third person set up against principal, 82
- repudiation of, refusal to deliver goods not amounting to, 270, 272
- securities negotiated without authority, 177
- to goods, obtained by fraud, 181
- sold in market overt, 178

TITLE DEEDS

- entrusted to agent, liability of principal for dispositions, 176

TORTFEASORS, JOINT.

- liability of, 217, 218

TORTS. See WRONGS OF AGENT.**TRADE,**

- usage of, implied authority from, 46

TRADE MARK.

- infringement of, liability for, 207

TRADE UNION.

- act committed by or on behalf of, 217
- inspection of books by agent, 7

TRAMWAY COMPANY,

- liability of, for acts of servants, 216

TRAVELLER,

- prevented from earning remuneration, 129

TRESPASS,

- liability for, 207, 215

TRUST,

- breach of, agent's liability for, 272, 273
- funds, dealings with, 272
- property, title to, under Statute of Limitations, 92
- improperly employed by partner, 10

TRUSTEE,

- agent as, for principal, 86
- of, 116 (n.)
- bankruptcy, in, ratification by, 41, 44
- company property transferred to, receiver of, 12
- of will, secret profit by, 94

TURF COMMISSION AGENT,

- implied authority as to betting, 56
- negligence by, 129
- payment of winnings by, 81

ULTRA VIRES,

- company, acts of, ratification of, 34, 36
- agent cannot act, 48
- wrongful act of agent, and liability of corporation, 215

UNAUTHORISED ACT,

- conversion, amounting to. *See* CONVERSION.
- losses or liabilities incurred, no indemnity against, 141
- of agent, dealings with money and negotiable securities, 177
- how far binding on principal, 167, 172
- in pledging negotiable securities, 178
- money, etc., coming to principal through, 214
- principal not bound with respect to persons with notice, 183
- principal's right to follow property, 227
- wrong resulting from, principal's liability for, 206
- of insurance broker or agent, 173, 174

UNAUTHORISED ACT—*continued.*

of underwriter, 174
ratification of. *See* RATIFICATION.
remuneration for, 132

UNDERWRITER

abusing authority, how far binding principal, 167
liability of insurance broker for premiums, 102
settlement with broker by way of set-off, 60
unauthorised act of, 174

UNDISCLOSED PRINCIPAL,

broker's implied authority to receive payment for, 61
definition of, 1
liability for price of goods supplied to manager, 170
right to sue and be sued, 185
customs and usages of market, 192

UNDUE INFLUENCE,

settled accounts, re-opening of, 91

UNLAWFUL TRANSACTION

between principal and agent, 80
no indemnity against losses or liabilities in, 141, 142
no remuneration in respect of, 130, 131

USAGE. *See* CUSTOM; STOCK EXCHANGE.

of the Stock Exchange. *See* STOCK EXCHANGE.

VENDOR,

agent acting for, and purchaser, 76

VOLUNTARY WINDING-UP

of company, agent prevented from earning remuneration by, 129, 130

VOLUNTEER CORPS,

contract on behalf of, 249, 252
ratification of, 36

WAGERING TRANSACTION,

no indemnity against losses and liabilities, 141, 143
no remuneration in respect of, 130, 131

WAR,

effect of, on agency, 275

WAREHOUSE MANAGER,

lien of, 148

WAREHOUSEMAN,

title denied by, 83

WAREHOUSING,

disobedience to instructions as to, 104

WARRANTY,

auctioneer, no implied authority to give, 62
authority, of. *See under* AUTHORITY.
for sale, must be given at time of sale, 47
given by agent for sale, 52
horse dealer, liability of principal for, 169
implied authority of factors as to, 60
to give by custom, 58

WEIGHTS AND MEASURES,

liability for act of servant in connection with, 287

WHARFINGER,

- interpleader by, 165
- lien of, 158
- general, by implication from custom, 147
- title denied by, 83

WIDOW,

- necessaries supplied to, after death of husband, 251, 285

WIFE. *See* **MARRIED WOMAN.****WILL,**

- trustee under, secret profit by, 94

WINDING-UP,

- effect on registration of transferred shares, 192, 193
- voluntary, of company, agent prevented from earning remuneration by, 129, 130

WOMAN. *See also* **MARRIED WOMAN.**

- cohabiting with man as wife, credit pledged by, 29
- man permitting assumption of his name by, liability of, 29

WRITING,

- authority may be given in, 46
- ratification of written contract need not be in, 40

WRONGFUL ARREST. *See under* **ARREST.****WRONGFUL DISTRESS.** *See under* **DISTRESS.****WRONGS OF AGENT,**

- act for benefit of agent, principal's liability for, 206
- acting within authority, principal's liability for, 206
- arrest and false imprisonment, 211, 216
- assault, 216
- co-agents, agent not liable for wrongs by, 273
- committed with principal's authority, liability for, 267
- criminal liability for, 286—289
- damages for, recovery of, 217, 218
- effect of payment in tort against principal or agent, 217
- fraud. *See under* **FRAUD.**
- fraudulent misrepresentation, 211, 212
- in course of employment, principal's liability for, 206
- infringement of copyright, trade mark or patent, 206, 207
- joint tortfeasors, 217, 218
- liability for, corporations, 214—217
 - joint tortfeasors, 217, 218
 - personal, 266, 267
 - principal's, 206, 267
 - public agent's, 205, 267
- libel, 206, 216, 217
- misappropriation, 213
- misrepresentations as to credit of third persons, 218
- money or property coming to principal through, 214
- negligence, 206, 207. *See also under* **NEGLECT.**
- personal liability for, 266, 267
- public agent, Crown not liable for, 205
 - liability of, 267
- servant of the Crown, 205 (n.)
- sub-agents, agent not liable for wrongs of, 273
- trade union, of, 217
- trespass, 207, 215
- wrongful distress, 207, 215

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